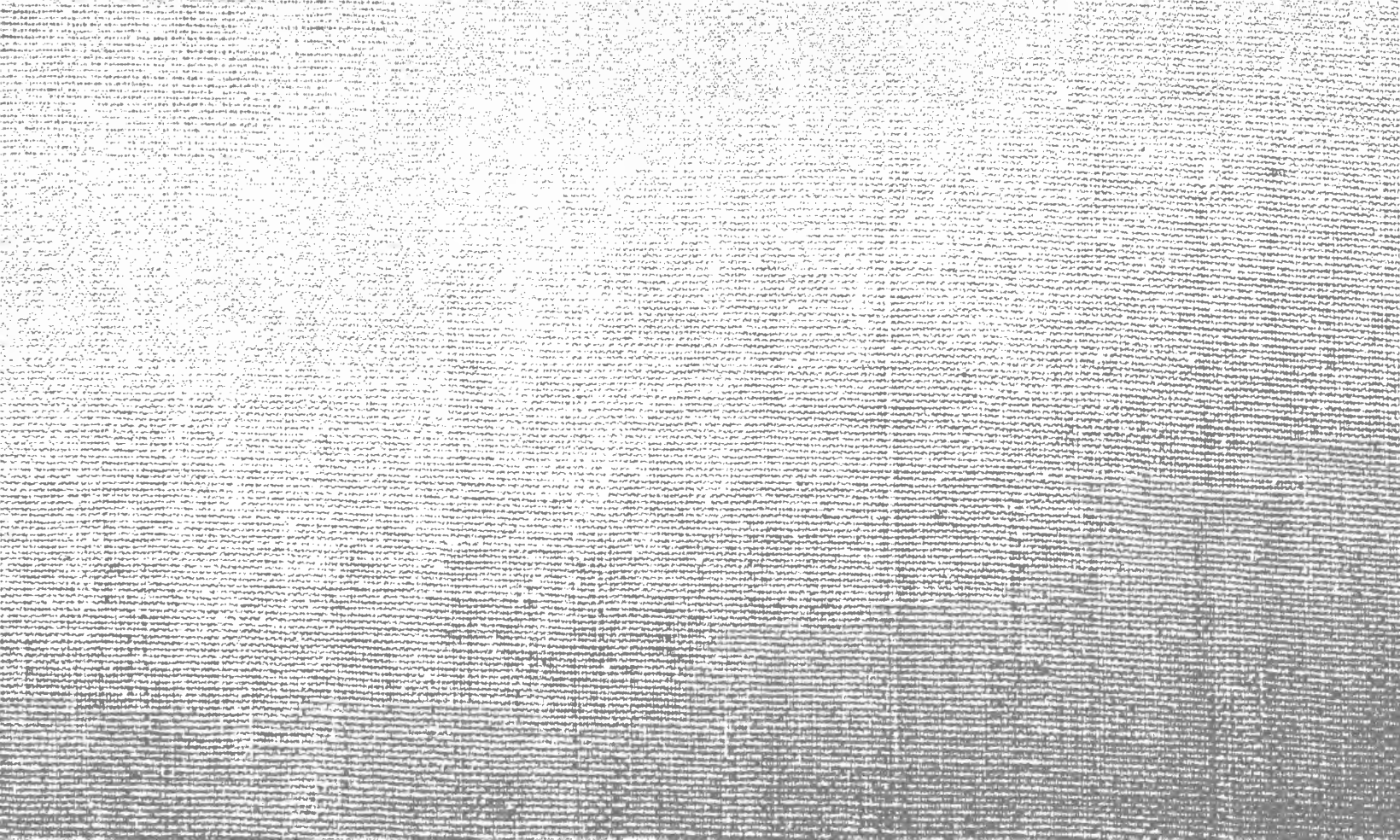

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

No. 12478

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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IN THE

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THOMAS CROW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

An Information was filed in the United States District Court, District of Nebraska, Omaha Division, on March 10, 1948, charging appellant under Section 408 of Title 18, United States Code (1946 Ed.) [TR[1] 10]. The case was transferred to the District Court of the Southern District of California pursuant to Rule 20 of the Federal Rules of Criminal Procedure [TR 11-18], and judgment was entered on April 20, 1948 [TR 29-30]. Notice of Appeal was filed on February 2, 1950 [TR 40]. This Court has jurisdiction under Section 2255 of Title 28 of the United States Code.

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[1]References preceded by the letters TR are to the typewritten "Transcript of Record"; and those references preceded by the letters AB are to Appellant's Opening Brief.

Statement of the Case.

On March 10, 1948, an Information was filed against the appellant in the United States District Court, District of Nebraska, Omaha Division. The Information, which was in one count, charged the appellant with having transported and with having caused to be transported in interstate commerce, a motor vehicle, knowing it to have been stolen [TR 10]. The transportation was alleged to have been from Omaha, Nebraska to Fayetteville, Arkansas. On the same day, pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure, there was filed in the same Court, by the appellant, a waiver of prosecution by indictment [TR 9].

On March 29, 1948, the appellant filed his consent to transfer of case for plea and sentence in the United States District Court, Southern District of California, as required under Rule 20 of the Federal Rules of Criminal Procedure [TR 11]; and following his plea of guilty in that Court on April 5, 1948 [TR 14-18], he was sentenced to a term of imprisonment of one year [TR 25, lines 18-22]. At all times from the date of his first court appearance to judgment the appellant was represented by counsel [TR 3, 4, 5, 6, 9, 13, 14, 15].

The appellant, on January 9, 1950, filed in the United States District Court, Southern District of California, a motion to vacate judgment and sentence, pursuant to the provisions of Section 2255 of Title 28, United States Code [TR 33-37]. Appellant based his motion on an alleged misconception of the law at the time he pleaded

guilty, claiming in his Statement of the Case [TR 34, lines 13-19], that "It appears in the information" filed against the appellant that title of the subject motor vehicle was acquired by the appellant by payment of a worthless check for same; and that the word "stolen" as it appears in Section 408 of Title 18, United States Code does not apply when the defendant has through fraud acquired title to the automobile which he transported interstate [TR 34-35, Petitioner's Argument]. On January 23, 1950, the motion of appellant came on to be heard before Judge Peirson Hall and on hearing of the motion the Court entered an order denying the same. At the time of filing the motion to vacate judgment and sentence, the appellant also filed a petition for a writ of *habeas corpus ad testificandum* to produce himself at the hearing on his motion [TR 38]. The petition was denied at the time of the hearing.

On February 2, 1950, the appellant filed a notice of appeal in the United States District Court, Southern District of California.

The Transcript of Record contains certain material which is alien to this cause. The Record makes occasional reference to Case Number 19821, a case against the appellant which originated in this District and which was disposed of at the same time as was the case which is the subject of the appeal [TR 25, lines 8-22, showing sentence imposed in Number 19821, and sentence imposed in the case which is the subject of this appeal, Number 19946].

Statutes and Regulations Involved.

(A) The Penal Statute.

Section 408 of Title 18, United States Code (1946 Edition), known also as the Dyer Act:[2]

> "Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5000, or by imprisonment or not more than five years, or both."

(B) The statute under which the appellant filed his motion to vacate judgment and sentence in the District Court:

Section 2255 of Title 28, United States Code (1946 Edition):[2]

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the . . . laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.
>
> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or other-

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[2]Immaterial portions of the Statute have been omitted.

wise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of *habeas corpus*."

(C) The rule under which the case was transferred from the District of Nebraska to the Southern District of California for plea and sentence:

Rule 20 of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code:

"A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been trans-

ferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made."

(D) The rule which appellant urges should have been applied by the Court at the hearing of appellant's motion (AB 30).

Rule 32(d) of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code:

> "Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Summary of Argument.

The argument of the Government is divided into three parts. (1) The first part will deal with the contention of the appellant that sentence was imposed by the Court in violation of the laws of the United States and was not authorized by law. (2) The second part discusses whether there was error or abuse of discretion by the Court in the manner in which the hearing on appellant's motion under Section 2255 was conducted. (3) The third part is concerned with the argument of appellant regarding the validity of Rule 20 of the Federal Rules of Criminal Procedure. (4) The last part answers appellant's contention that the Court should have granted the withdrawal of appellant's plea of guilty under Rule 32(d) of the Federal Rules of Criminal Procedure.

ARGUMENT.

I.

The Sentence Imposed by the Court Was Not in Violation of the Laws of the United States and Was Authorized by Law.

At the time of sentence of the appellant, the Court was acquainted with appellant's activities in connection with the offense with which he was charged [TR 23, lines 14-18]; and at the time the Court made the order denying the motion of the appellant under Section 2255 of Title 28, there was before the Court the appellant's argument and statement of the case which restate facts already known to the Court [TR 33-37]. The appellant's argument cited the authority on which he now principally relies to show that the Court imposed sentence in violation of the laws of the United States; namely, *Hite v. United States*, 165 F. 2d 973 (10th Cir., 1948) [TR 35, lines 17, 18]. It must be assumed that the Court rejected this authority in denying appellant's motion, unless other cause appear. The appellant argues that since he obtained possession and *title* to the automobile by false pretenses (giving of a bad check), rather than obtaining possession by larceny, the car was not "stolen" in the true meaning of that word as used in Section 408 of Title 18. This is the holding of the *Hite* case, where it was determined that the word "stolen" as used in the Section meant *obtained by larceny*. It is this principle that the Court rejected in denying appellant's motion. But set out below is authority which sheds doubt on the correctness of the ruling in the *Hite* case.

In the case of *Crabb v. Zerbst,* 99 F. 2d 592, the Court had occasion to define the word "steal" as it appeared in Title 18, United States Code, Section 100.[3] In answering the defendant's contention that "to steal" was "to commit larceny" the Court said:

> " 'Steal' and 'purloin' are not synonymous, though used in dictionaries in defining larceny and in defining each other; and 'steal,' *having no common law definition* to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to 'purloin.' " (Emphasis added.)

In *United States v. Handler,* 142 F. 2d 351, the defendant again insisted that the word "steal" was synonymous with the act of common law larceny. The statute under consideration was the National Stolen Property Law, Title 18, United States Code, Section 415,[4] and the controversy

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[3]§100 (Criminal Code, Section 47). Embezzling public moneys or other property. Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or other valuable thing whatever, or the moneys, goods, chattels * * *.

[4]Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin * * *.

had to do with the meaning of the phrase "with intent to steal and purloin." At page 353 the Court said:

> "But we cannot accept the appellant's argument that a taking with intent to steal is synonymous with technical larceny. In various federal statutes the word 'stolen' or 'steal' has been given a meaning broader than larceny at common law. See United States v. Trosper, 127 Fed. 426, 477, 'steal' from the mail; United States v. Adcock, 49 Fed. Supp. 351, 353, interstate transportation of 'stolen' automobile. * * *."

The *Adcock* case, cited immediately above, is an instance where the Court held that the word "stolen," as used in Section 408, could mean embezzlement. The owner loaned his automobile to a former employee to go to a nearby town. The employee made his planned journey and then decided to keep the automobile. He subsequently drove the car over several state lines and was finally indicted for violation of Section 408. Under no theory could the employee be said to have committed larceny by the taking, for the machine was in his sole possession rightfully at the time of his criminal conversion of it. It was an embezzlement of the automobile. The Court in defining the word "stolen" as it appeared in the statute said:

> "I am of the opinion that the word 'stolen' is used in the statute not in the technical sense of what constitutes larceny, but in the well known and accepted meaning of taking the personal property of another for one's own use without right or law, and that

> such a taking can exist whenever the intent to do so comes into existence and is deliberately carried out regardless of how the party so taking the car may have originally come into possession of it."

It would appear from these cases that the words "stolen" and "steal" are not too limited in their meaning, despite the holding in the *Hite* case. The words are used to apply to all common law criminal offenses against property. It is true that the phrase "to steal, take and carry away" was a frequently used definition of larceny at common law; but it does not follow that the word apart from the phrase carries the same meaning as the phrase.

There appears to be little reason for limiting the meaning of the word "stolen" as was attempted in the *Hite* case. For those who limit the meaning on the premise that it had a legal meaning at common law, the answer must be that there is but little authority for the premise. The word has a broader connotation than larceny alone. The Government, therefore, takes the position that the Court, in denying the petition of the appellant, placed a construction on the word "stolen," which is both reasonable under the law, and much to be desired. It is submitted that this Court has the privilege of adopting the construction of the District Court and should adopt that construction in order to give the Statute the full effect and coverage which Congress must have intended.

II.

There Was Neither Error nor Abuse of Discretion by the Court in the Manner in Which the Hearing on Appellant's Motion Under Section 2255 of Title 28 Was Conducted.

Section 2255 of Title 28, United States Code, specifies that on a motion made pursuant to the Section, "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." The discretion permitted the Court is not limited. The proper exercise of that discretion is any exercise of it. These considerations dispose of appellant's fifth Specification of Errors (AB 7).

The appellant's first, second and third Specification of Errors (AB 7) are based upon the assumption that the Court failed to conduct the hearing in strict conformity with Section 2255. An examination of the minutes of the hearing [TR 39] would indicate that the hearing was proper. This appears from the language used: "For hearing on motion of defendant to vacate judgment and sentence *pursuant to provisions of Title 28, Sec. 2255 U. S. C.* . . ." Emphasis added.)

The appellant's fourth Specification of Error is sufficiently answered in the first part of the Argument.

III.

Rule 20 of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code, Is Valid Under the Constitution of the United States, and the District Court Acting Under Its Provisions Had Jurisdiction of the Appellant.

The appellant asserts the invalidity of Rule 20 of the Federal Rules of Criminal Procedure, citing *United States v. Bink,* 74 Fed. Supp. 603, and other cases which support it. In the *Bink* case, in an exhaustive discussion of the Rule, Judge Fee held that the Constitution[5] forbade indictment, trial or judgment in a criminal case in any state or district except where the crime was committed, and that the consent of the parties could have no effect to take jurisdiction from one district and confer it on another. In his attack on Rule 20, the appellant relies chiefly on the *Bink* case.

Those portions of the Constitution relied upon by the appellant as definitive of the limits of jurisdiction of Federal Courts in criminal matters do not support appellant's contention that they forbid the transfer of a criminal case for the purpose of a plea of guilty or *nolo contendere,* and judgment. The Constitutional provisions speak only of *trial* of a criminal matter in other than the state of its commission or the district of its commission. There is no

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[5]Article III, Section 2, Clause 3, provides: "The trial of all crimes * * * shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed * * *."

Amendment VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *."

where a proscription of transfer for the purposes set out in Rule 20.

But assuming that the language in the Constitutional provisions implies all criminal proceedings from indictment to judgment, the Government contends that the language was calculated to guarantee to the accused a right rather than to establish jurisdiction only, and that the right to prosecution in the district or state in which the crime was committed may be waived by the accused. Certain it is that the provisions for trial by jury which appear together with the provisions for place of trial, are deemed to be a right of the accused and hence may be waived. In *Patton v. United States,* 281 U. S. 276, the appellant argued that the Constitution did not confer a right or privilege of trial by jury, but made it mandatory; but the Court, after discussing the effect of the VI Amendment, stated at page 298:

> "Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement."

And in *Hagner v. United States,* 54 F. 2d 446 (affirmed, 285 U. S. 427), and *Mahaffey v. Hudspeth,* 128 F. 2d 940 (certiorari denied, 317 U. S. 666), it was expressly held that these portions of the Constitution deal with venue rather than jurisdiction and that the accused may waive the jurisdiction of the court of trial.

It appears that the three cases cited and discussed above overrule *Ventimiglia v. Aderhold,* 51 F. 2d 308, which was decided shortly after the *Patton* case but before the *Hagner*

and *Mahaffey* cases. The *Ventimiglia* case, relied upon by the appellant, construed Article III, Section 2, Clause 3, as establishing jurisdiction only, which is a construction clearly at variance with that of the Supreme Court in the *Patton* case.

Rule 20 has operated as a most useful device, generally meeting with favor wherever employed. It has been adopted by the Supreme Court of the United States and has been a part of our adjective law for almost four years. Its almost universal acceptance for this period of time attests to its effectiveness and tends to create by that fact alone a strong presumption of its validity. For those who would object that it gives a defendant an opportunity to "shop around," we remind that the election by the defendant is possible only on the concurrence of the United States Attorney at the place of arrest and at the place of the crime.

IV.

Failure of the Court to Invoke Rule 32(d) of the Federal Rules of Criminal Procedure, Section 687 of Title 18, United States Code, to Permit the Appellant to Change His Plea From Guilty to Not Guilty When the Appellant Did Not File a Motion Pursuant to the Rule, Was Not Error.

The appellant failed to move the court under the provisions of Rule 32(d). This remedy is still available to him. It is a novel theory that it may be error for a Court to fail to act on a motion not made or filed. But it is too early for the appellant to complain in this regard, for he may still resort to Rule 32(d).

V.

Conclusion.

The appellant is in error in his conclusions of law. The word "stolen" as it appears in Title 18, United States Code, Section 408, is descriptive of vehicles taken by larceny, embezzlement, or by false pretenses, in the common law meaning of these terms. The Court in ruling on appellant's motion with the facts before it, did not commit error in denying the appellant's motion.

The appellant was given a proper hearing under the provisions of Section 2255 of Title 28, United States Code. The facts were before the Court at the time of the hearing as were also the appellant's authorities on the law. The minutes of the motion indicate a compliance with the provisions of Section 2255.

The Court had jurisdiction of the appellant at the time of plea and sentence, by reason of the operation of Rule 20 of the Federal Rules of Criminal Procedure. The Rule is concerned with a matter of venue rather than jurisdiction and is not in violation of pertinent sections of the Constitution.

Respectfully submitted,

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APPELLEE'S SUPPLEMENTARY BRIEF.

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APPELLEE'S SUPPLEMENTARY BRIEF.

Introductory Statement.

The jurisdictional statement, statement of the case, and statement of the statutes and regulations involved, in this appeal, are contained on pages 1-6 of Appellee's Reply Brief. The purpose of this brief is to acquaint the Appellant and the Court with further argument to be advanced by the Appellee on hearing.

ARGUMENT.

The Motion of Appellant for Relief Under the Provisions of Section 2255 of Title 28, United States Code, Is Premature.

It is the contention of the Government that the Appellant may not *at this time* prosecute his appeal under the provisions of Section 2255 of Title 28, United States Code, because by the clear wording of the statute the remedy is available only in those instances where the Appellant seeks to attack the sentence he is then serving. Appellant seeks relief from a sentence he will not commence to serve until April 20, 1953. He was sentenced on April 20, 1948, in Case Number 19821, to five years imprisonment [Tr.[1] 7], and on the same date was given the one year sentence he now attacks, which is to be served at the expiration of the five year term [Tr. 29]. This feature of Section 2255 is not novel, for it is clear that the Writ of Habeas Corpus would not be available to Appellant to attack this one year sentence at this time, *McNally v. Hill, Warden,* 293 U. S. 131, 79 L. Ed. 238; *Holiday v. Johnston,* 313 U. S. 342, 85 L. Ed. 1392.

These considerations distinguish this appeal from *Martyn v. United States,* 176 F. 2d 609, and *Ex parte Atkinson,* 84 Fed. Supp. 300, which were appeals under Section 2255, relied upon by Appellant. The Court in each of these cases released the Appellant from custody after

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[1]References preceded by the letters "Tr." are to the typewritten "Transcript of Record."

ruling that Appellant was *then serving* a sentence wrongfully imposed. *Griffen v. United States,* 173 F. 2d 909; *United States v. Weil,* 46 Fed. Supp. 323; *Waldron v. United States,* 146 F. 2d 145; *Rutkowski v. United States,* 149 F. 2d 481; and *United States v. Coy,* 57 Fed. Supp. 661, also cited by Appellant, do not involve Section 2255.

It may appear that the Appellant is subjected to hardship by being denied anticipatory relief of the nature he here seeks, in that the imposition of the one year sentence operated to deprive Appellant of any consideration for parole during his five year term. But it must be assumed that the sentencing Court intended that Appellant serve a full five year sentence, and would have imposed sentence accordingly had Appellant been sentenced only in Case Numbered 19821.

Respectfully submitted,

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Appellee's Reply to Appellant's Reply to Appellee's Supplementary Brief.

At the time of oral argument, August 10, 1950, leave was granted the Appellant to reply to Appellee's Supplementary Brief more fully by Memorandum, and at the same time the Appellee was given leave to file a Memorandum in reply within 15 days. Appellant's Memorandum was received by Appellee on August 23, 1950, and consists of argument in support of his contentions that: (1) Appellant's motion to vacate the sentence is not premature, and, (2) *United States v. Gallagher* does not dispose of the question raised as to the constitutionality of Rule 20 of the Federal Rules of Criminal Procedure. (A. R. 1-2.)* The argument of Appellee will follow in the same order.

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*References preceded by the letters "A. R." are to Appellant's Reply to Appellee's Supplementary Brief.

ARGUMENT.

Appellant's Motion to Vacate the Sentence, Under Section 2255 of Title 18, United States Code, Is Premature.

The Appellant contends that an ambiguity exists in Section 2255 of Title 28, U. S. C. None, in fact, exists. The statute provides a remedy whereby a prisoner in the custody of the United States may attack the validity of the sentence he is serving in the court wherein he was sentenced.

The second paragraph of the section states that, "A motion for such relief may be made at any time." It is limited by the language of the first paragraph of the section. The Appellee submits that this second paragraph was designed to avoid the limitation appearing in the case of *United States v. Mayer,* 235 U. S. 55, wherein the Court stated at page 67:

> ". . . a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term."

The Appellant argues that Congress must have intended by this section to authorize prisoners to attack a sentence at any time (A. R. 3), and advances as one argument supporting his construction that it would operate to prevent evidence from becoming stale. But his construction would also have just the opposite effect. The possibilities are far-reaching, for an appellant could be a prisoner seeking to set aside a sentence he served many years ago. The limitation to his seeking of the remedy

would be his death. A 70-year-old prisoner could move to have a sentence of three years, which he served in his youth, set aside. Where would then be the "Court which imposed the sentence"?

But the plain language of the statute readily lends itself to a preferable construction. The prisoner must be "in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that *the sentence* was imposed in violation of the . . . laws of the United States . . ." and he may ". . . move the court which imposed *the sentence* to vacate, set aside or correct the sentence." (Emphasis added.) Appellant would have us read the emphasized phrases as "a sentence." Such violence to the language of a statute cannot be supported under any rule of construction, and this is particularly true when the violence would achieve the possible results which would obtain under Appellant's construction. Also, it is submitted, the Appellant must be one "claiming the right to be released," in the language of the section. Thomas Crow does not claim that right.

Appellant is deprived of nothing if he is required to wait until April, 1953, to move the court below to vacate his sentence. The argument is advanced that if he could now successfully move the court to vacate the one-year sentence, he would be eligible for parole on his present sentence. (A. R. 6.) But this is to disregard the obvious intention of the sentencing court that Appellant should serve the full five years of his first sentence. We must assume that the sentencing court imposed the

consecutive one-year sentence to insure a five-year sentence. In effect, Appellant now asks this Court to award him not one year of freedom, but approximately three years, if his efforts toward parole were later successful. These considerations may have been important in the drafting of Section 2255, and may also explain why the Writ of Habeas Corpus has never been available in anticipation of imprisonment. The imposition of a consecutive sentence is calculated to insure a certain minimum sentence. The Appellee urges that sentence imposed properly should remain undisturbed. The Appellant cannot complain if his remedy is available at the usual time, namely, when he is unlawfully in custody. Appellant's whole argument in this regard is based upon the false assumption that he is deprived of a right in being deprived of parole possibilities; yet, may we not assume that the sentencing court would have imposed a much longer term of imprisonment in Case No. 19821, had no sentence been imposed in the instant case, to insure imprisonment of five years? While it is true that this reasoning will not apply in those instances where the consecutive sentence is imposed by some other court at a later time, those situations are so rare as to be valueless in these considerations.

It may be that Appellant has a remedy to move the lower court to vacate the sentence at this time, under the dictum in *Holiday v. Johnson*, 313 U. S. 343. It appears that the Appellant in *Lockheart v. United States*, 136 F. 2d 122, was successful in securing anticipatory relief, the Court ruling that Lockheart had filed a "motion to vacate

sentence." In *Rutkowski v. United States*, 149 F. 2d 481, the Appellant filed a "motion to vacate sentence," and secured anticipatory relief. Other cases cited by Appellant (A. R. 11), appear to hold that a motion to vacate sentence may be entertained at any time by the sentencing court. But the Appellant here chose to proceed under a statute and is bound by its terms. None of the cited cases are concerned with procedure under Section 2255. All were cases decided prior to enactment of Section 2255. The case of *United States v. Bice,* 84 Fed. Supp. 290, is a case where the defendant moved the sentencing court by "motion to vacate sentence." The defendant sought to have set aside a sentence he had served twenty-one years before. Although this case arose after enactment of Section 2255, the defendant did not proceed under that section. His motion was entertained. The case demonstrates that a "motion to vacate sentence" may be available to this Appellant, but he has chosen the wrong remedy here.

Appellant urges that Congress could not have intended to deny anticipatory relief under Section 2255. How easy it would have been for Congress to give a clear statement of that intent in the drafting of the section. If we assume that what Appellant urges is to be desired, it, nevertheless, is for Congress to give it expression. Appellee has found no decision where anticipatory relief was granted under this section nor has Appellant cited any such cases.

Rule 20 of the Federal Rules of Criminal Procedure Is Valid Under the Constitution and Laws of the United States.

The Appellant urges that the case of *United States v. Gallagher* (unreported, decided June 21, 1950, in a unanimous opinion with six judges sitting *en banc* in the Court of Appeals for the 3rd Circuit), is not substantial authority for the constitutionality of Rule 20 of the Federal Rules of Criminal Procedure because the question was decided without it having been raised by the Appellant on his appeal. (A. R. 12.) The Appellee now offers additional authority for the constitutionality of the Rule, in the case of *Levine v. United States*, 182 F. 2d 556. In this case from the Court of Appeals for the 8th Circuit, decided May 31, 1950, the Appellant urged that his motion to vacate judgments and sentences in two cases be granted because they arose from his pleas of guilty under the provisions of Rule 20. Appellant had been indicted in the Eastern District of Michigan and the Northern District of Illinois for violations of United States Postal Laws. After his arrest in the Eastern District of Missouri he pleaded guilty under the provisions of Rule 20 in that District and was sentenced. The Appellant relied on *United States v. Bink,* 74 Fed. Supp. 603, to support his argument that the Rule was unconstitutional. In rejecting the *Bink* decision and upholding the constitutionality of the Rule the Court at page 558 said:

> "The cited case supports the contention of appellant, but it is not, of course, controlling on this court.

> We are of the opinion that Rule 20 is constitutional; that a person charged with a federal offense in one district may waive the right to be tried in that district, and that he may request a transfer to another district to enter a plea of guilty, and that a judgment entered in the district to which the case is transferred is a valid and binding judgment."

The Court rejected the argument of the *Bink* case to the effect that place of trial is jurisdictional under Article III, Section 2, Clause 3, and the Sixth Amendment, of the Constitution, and cannot be waived by the defendant, and held, as was held in the *Gallagher* case, that place of trial is a procedural right and privilege which may be waived. The Court also observed that "Rule 20 and all other Rules of Criminal Procedure for the United States District Courts have been approved by the Supreme Court . . ." We now have express approval of the rule by decision in two circuits and approval by the Supreme Court. In conclusion we wish to point out that the Rule has been supported in the *Gallagher* and *Levine* cases without passing on the important question of what is meant by the word "trial" as it appears in the above cited constitutional provisions. The act of pleading guilty may not be embraced by the word "trial."

Conclusion.

The Appellant may at this time have a remedy whereby he might seek vacation of the sentence in Case No. 19946, by a motion to vacate; but here he has chosen to proceed under the provisions of Section 2255 of Title 28 which provide only for an attack on a sentence being served by one claiming the right to be released, and his motion is premature.

Rule 20 of the Federal Rules of Criminal Procedure is a constitutional provision under the rulings of the *Levine* and *Gallagher* cases cited above, and has been approved by the Supreme Court of the United States; it is therefore entitled to the strongest presumption of constitutionality in the absence of a ruling by the Supreme Court.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

NORMAN NEUKOM,
Assistant United States Attorney,
Chief of Criminal Division,

RAY M. STEELE,
Assistant United States Attorney,
Attorneys for Appellee.

No. 12481

United States
Court of Appeals
For the Ninth Circuit.

FAY J. HANSEN,

Appellant,

vs.

ERNEST A. JONSON, Receiver of Vita-Pakt Associates, Inc., an Insolvent Corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington
Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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577 Dexter Horton Building,
Seattle, Washington.

In the District of the United States for the Western District of Washington, Northern Division

In Bankruptcy, No. 37835

REFEREE'S CERTIFICATE ON REVIEW

In the Matter of
FAY J. HANSEN,

Bankrupt.

To the Honorable Lloyd L. Black, United States District Judge:

I, Van C. Griffin, Referee in Bankruptcy in charge of these proceedings, do hereby certify:

The schedules attached to the petition recited that the bankrupt owned certain real and personal property which the bankrupt and his wife had transferred while under duress from threats of criminal prosecution to the Vita-Pakt Associates, Inc., just seven days before the filing of the petition in bankruptcy. The bankrupt claimed as exempt his equity in the property so transferred, and the trustee in making his report upon exemptions, recommended that the claim of exemption be allowed and the Referee entered an order allowing the exemptions as claimed.

Thereafter the bankrupt by petition secured from the Referee an order directed to the trustee and Ernest A. Johnson, receiver for Vita-Pakt Associates, Inc., to show cause why he should not, in fact,

have the exemptions as claimed. Before this matter was heard the trustee filed a petition for and secured an order directing the receiver to appear and show cause why the conveyances by the bankrupt to the corporation should not be declared void, and in response thereto the receiver appeared specially and objected to the court's jurisdiction. On the 19th day of November, 1948, a hearing was had upon the receiver's special appearance, and the following evidence and no other was received thereon.

R. C. Nicholson testified as follows:

I am the trustee in the bankruptcy of Fay J. Hansen. After my appointment as trustee the keys to Mr. Hansen's house were turned over to me, his car was stored in a garage in my name and the storage check was turned over to me; and I have been in physical possession of said house and car ever since and of the furniture and equipment in said house, and am now in possession of it.

Fay J. Hansen testified as follows:

I am the bankrupt in above case. At the time I filed my petition in bankruptcy herein I was in actual physical possession of my house at 4113 S.W. 109th St., Seattle, Wash., all the household furniture and equipment located in the house, and the Oldsmobile automobile. I stored the car in a garage in the name of Mr. Nicholson, the trustee, and I turned over to my attorney, Mr. Wiley, the keys to the house and the keys and claim check to the car, for delivery to the trustee.

Alex Wiley testified as follows:

I am attorney for the bankrupt, Mr. Hansen. Shortly after the first meeting of creditors in said bankruptcy Mr. Hansen delivered to me the keys to his house and the claim check for his Oldsmobile car for delivery to the trustee. I did thereupon deliver said keys and claim check to Mr. Day, the attorney for the trustee, in his office in the Dexter Horton Building.

(End of evidence.)

Thereafter the trustee, receiver and bankrupt entered into a written stipulation that the property transferred as above referred to should be sold by the trustee under the supervision of the Referee and that the rights and liens of the said parties be transferred from the property to the proceeds of the sale thereof, subject to costs incident to the sale and administration thereof.

Between the time of the filing of the stipulation and the conclusion of the hearing upon the show-cause orders, the trustee had sold all the property for cash, and the Referee denied the receiver's special appearance because of the testimony that the trustee had possession of the property and because of the fact that the parties had stipulated that the trustee might sell the same, and treated the hearing upon the show-cause orders as

1. A petition of the bankrupt to have paid to him out of the money his exemptions as claimed;

2. A petition of the trustee that he be awarded all the funds because the award of exemptions was invalid and that the conveyances to the corporation were void; and

3. A petition of the receiver that the funds be awarded to him because he held valid conveyances and the bankruptcy court had no jurisdiction to determine the validity of the conveyances.

A hearing was had on November 29, 1948, and on December 9, 10, and 16, 1948, which was stenographically reported and a transcript thereof made by the court reporters, and which the Referee certifies to be accurate and will transmit with this certificate without a summary thereof. A part of the hearing on these matters was held on December 8, 1948, at which no court reporter was in attendance; therefore, the Referee has made a summary thereof.

Thereafter the Referee filed a written memorandum decision and entered a written order awarding to the bankrupt his exemptions as claimed, less the amount of costs to be charged against the same, and adjudging that the conveyances to Vita-Pakt Associates, Inc., were void and the trustee was, therefore, entitled to the remainder of the funds from the sale of the property.

Ernest A. Jonson, receiver for Vita-Pakt Associates, Inc., and the trustee, R. C. Nicholson, each feeling aggrieved at the decision and order of the Referee, have filed petitions for review setting forth therein the errors of which they complain. Each

of the parties has filed a proposed summary of certain portions of the testimony taken when no court reporter was present and has filed objections to the summary proposed by his adversary and motions to strike. A hearing lasting a half day has been held at which said matters were argued and the parties were given an opportunity to refresh the recollection of the Referee. The Referee has elected to make his own summary of the hearings held where no court reporter was in attendance.

The issues as seen by the Referee are set forth in his memorandum decision, but briefly he certifies the questions involved in this review to be:

1. Were the conveyances from Hansen to Vita-Pakt preferential and void?

2. Did the receiver sufficiently trace the identity of the money drawn from the corporation into the proceeds of the sale of this property to entitle him thereto on his contention that he was not a creditor but merely tracing and recapturing his own property?

3. When the corporation demanded and received from Hansen property acquired by Hansen from sources other than money taken from the corporation, did it make an election to become a creditor and did it thereby estop itself from asserting the right to recapture the property?

4. Is the order allowing the exemptions controlling unless and until vacated or set aside for good cause shown?

5. Were the conveyances absolutely void because obtained by duress?

6. If the order setting aside the exemptions were deemed vacated, should the bankrupt be denied his exemptions where the conveyance was made of all his property to protect his creditors and not to defraud them? If the conveyance was not under duress, is it comparable to a general common law assignment for the benefit of creditors, which has been held not to deprive the assignor of a later claim to exemptions in bankruptcy.

7. Did the Referee commit error by action without jurisdiction or abuse his discretion in denying the receiver's special appearance and treating the responses to show-cause orders as petitions for apportionment of the sale price?

[Endorsed]: Filed February 24, 1949.

[Title of District Court and Cause.]

TRUSTEE'S REPORT OF EXEMPT PROPERTY

To Van C. Griffin, Referee in Bankruptcy:

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property, under the provisions of the Act of Congress relating to bankruptcy, as his exemptions allowed by law and claimed by him in his schedules filed in the above-entitled proceeding.

1. Real Property.

   Particular Description—Equity in real property described as: Lot 22, Block 4, Arroyo Vista, King County, Washington. (Rem. Rev. Stat. §528 & 532)—to the extent of, estimated value $4,000.00.

2. Furniture.

   Particular Description—Household furniture and furnishings situated on the property described as Lot 22, Block 4, Arroyo Vista, King County, Washington,—equity. (Rem. Rev. Stat. 563)—to the extent of, estimated value $500.00.

3. Wearing Apparel.

   Particular Description—Wearing apparel and ornaments of the person. (Rem. Rev. Stat. §563), estimated value $300.00.

4. Personal Property.

   Particular Description—Equity in 1948 Oldsmobile. (Rem. Rev. Stat. §563)—to the extent of, estimated value $250.00.

Dated this 31st day of August, 1948.

/s/ R. C. NICHOLSON,
Trustee.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 3, 1948.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S REPORT OF EXEMPTIONS

At Seattle, Washington, in said district, on the 20th day of October, 1948.

It appearing to the Court that the trustee herein has more than ten (10) days prior to the entry of

this order filed his report of exempted property in accordance with law, and no objections having been taken thereto,

It Is Ordered that the said trustee's report of exempted property be and the same hereby is, in all things confirmed, and the bankrupt's claim to exemptions is hereby allowed accordingly.

It Is Further Ordered that the property specified in such report be and the same is hereby set apart to the bankrupt as exempt.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed October 20, 1948.

[Title of District Court and Cause.]

PETITION FOR ISSUANCE OF ORDER TO SHOW CAUSE

Comes now Fay J. Hansen, bankrupt herein, and petitions the Court for the issuance of an order directed to Ernest A. Jonson, as receiver of Vita-Pakt Associates, a corporation, and R. C. Nicholson, trustee herein, to show cause before the Referee in Bankruptcy herein why certain transfers and conveyances made by bankrupt to said Vita-Pakt Associates, Inc., should not be set aside and declared void; and in support of said petition alleges:

I.

That petitioner is the bankrupt in the above-entitled cause.

II.

That on July 29, 1948, petitioner executed and delivered to Vita-Pakt Associates, Inc., a corporation, without any consideration therefor, a bill of sale of all his household furniture located at 4113 S.W. 109th St., Seattle, Wash., and of his 1948 Oldsmobile automobile; and a quit-claim deed of the following real property located in King County, Washington, to wit: Lot 22, in Block 4 of Arroyo Vista (being the home of petitioner), and Lot 1, Block 3, Arroyo Vista; and a transfer of all of his shares of stock in said Vita-Pakt Associates, Inc.

III.

That thereafter, and after the adjudication in bankruptcy of petitioner herein, said Ernest A. Jonson, having been appointed receiver of said corporation on application of the directors and stockholders thereof, by the Superior Court of the State of Washington for King County, did qualify as such receiver, and that he is still acting as such receiver.

IV.

That at the time of said transfers said bankrupt was insolvent; and said Vita-Pakt Associates, Inc., had reasonable cause to believe that said petitioner was insolvent. That said transfers were made by pe-

titioner within four months before the filing of his petition in bankruptcy herein. That the effect of such transfers would be to enable said Vita-Pakt Associates, Inc., to obtain a greater percentage of its debt, if any it can establish, than any other creditor of the same class; and such transfers constituted an illegal preference and are void as to your trustee herein.

V.

That said transfers were made without fair consideration by bankrupt, who was thereby rendered insolvent, and were fraudulent as to bankrupt's then existing creditors, and are null and void as to the trustee herein.

VI.

That said transfers were made without any consideration whatever, past or present, and were extorted from bankrupt by threats of criminal prosecution; and are entirely null and void as to bankrupt and as to the trustee herein.

VII.

That all of the property, except said shares of stock which was the subject of said conveyances, was in the possession of bankrupt at the time of his adjudication in bankruptcy; and since said adjudication has been and now is in the possession of the trustee herein.

VIII.

That part of the property so conveyed has been

allowed and set off, by the trustee herein, as exempt to the bankrupt, and the Referee in Bankruptcy has duly entered his Order Approving Trustee's Report on Exemptions. But that said trustee has been unable, and is still unable, to deliver said exempt property to petitioner herein, on account of the claims thereto made by Ernest A. Jonson as such receiver by virtue of said aforementioned conveyances.

IX.

That it is to the benefit of the above bankrupt estate that the validity of the said transfers be adjudicated as soon as possible, so that the trustee may proceed with the prompt administration and liquidation of this estate.

Wherefore, petitioner prays that an order be issued requiring Ernest A. Jonson, as receiver of Vita-Pakt Associates, Inc., a corporation, and R. C. Nicholson, as trustee herein, to appear before the Referee in Bankruptcy herein at a time certain to show cause, if any they have, why said transfers and conveyances by said bankrupt to Vita-Pakt Associates, Inc., a corporation, should not be adjudged null and void as to petitioner and the trustee herein.

/s/ ALEX WILEY,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed November 2, 1948.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The above-entitled matter having come on duly for hearing upon the petition of the bankrupt herein for an Order to Show Cause herein, and no adverse interest being represented, and the Court being duly advised, and believing said Order should issue;

Now, therefore, it is Ordered that Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., a corporation, and R. C. Nicholson, trustee herein, be and appear before the undersigned Referee in Bankruptcy in his Courtroom in the United States Courthouse, Seattle, Washington, at the hour of 2:00 o'clock p.m., on the 16th day of November, 1948, then and there to show cause, if any they have, why those certain transfers and conveyances by Fay J. Hansen, bankrupt herein, to Vita-Pakt Associates, Inc., a corporation, made on or about July 29, 1948, of all his household furniture and equipment, one 1948 Oldsmobile automobile, and the following real property: Lot 22, in Block 4, of Arroyo Vista, and Lot 1, Block 3, Arroyo Vista, all in King County, Wash., should not be adjudged to be null and void as to the trustee herein and as to bankrupt.

It is further Ordered that a duly certified copy of this Order shall be served upon said Ernest A. Jonson, as such receiver, and R. C. Nicholson, trustee in above matter, at least five days before the date set for the hearing on said petition.

Dated at Seattle, Washington, this 2nd day of November, 1948.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed November 2, 1948.

[Title of District Court and Cause.]

STIPULATION

The undersigned, Carl Jonson, one of the attorneys for Ernest Jonson, Receiver of Vita-Pakt Associates, Inc.; Alex Wiley, attorney for Fay J. Hansen, the bankrupt, and William J. Walsh, Jr., attorney for R. C. Nicholson, Trustee of the Estate of Fay J. Hansen, a bankrupt, representing principals who presently claim some right, title or interest in the following described property:

Lot 22, Block 4, Arroyo Vista Addition, King County, Washington.

Lot 1, Block 3, Arroyo Vista Addition, King County, Washington.

1948 Oldsmobile (Motor No. 8-138387H).

Household furniture and furnishings, as itemized in the trustee's inventory on file herein, said property being located in the residence at 4113 S.W. 109th, Seattle.

Whereas, it is deemed desirable and to the best interests of each of the respective parties hereto that the above-described property be sold free and clear of all claims, and that the rights, interests, and claims of each of the parties hereto attach to the proceeds of said sale or sales.

Now, Therefore, It Is Agreed on behalf of the respective parties hereto as follows:

I.

That the trustee in bankruptcy may dispose of the above-described property at public or private sale as directed by the Referee in Bankruptcy, each party hereto agreeing to cooperate in order to effectuate a sale, and to that end, agree to execute any instruments necessary for the transfer of the above-described property. It is agreed that the approval of any sale or sales by the referee in bankruptcy shall be binding upon all parties hereto. It is further agreed that the above-mentioned property may be sold by the trustee, free and clear of all liens, claims, interests, or rights in favor of any of the undersigned or their principals.

II.

The present right, title, interest, or claim, if any, of any or all of the undersigned, shall attach to the net proceeds of said sale or sales of said property, in the same manner and to the same extent as though said property or properties had not been converted into cash. The commingling of any such proceeds of

sale shall be without prejudice to the rights of any party hereto.

III.

The net proceeds of the sale or sales shall be deposited in a depository approved by the Referee in Bankruptcy, in the name of R. C. Nicholson, Trustee in the Estate of Fay J. Hansen, a bankrupt.

Dated at Seattle, Washington, this 26th day of November, 1948.

/s/ CARL JONSON,
One of the Attorneys for Ernest Jonson, Receiver of Vita-Pakt Associates, Inc.

/s/ WILLIAM J. WALSH, JR.
Attorney for R. C. Nicholson, Trustee.

/s/ ALEX WILEY,
Attorney for Fay J. Hansen, a Bankrupt.

Ernest Jonson, Receiver of Vita-Pakt Associates, Inc., is hereby authorized by and through his attorneys to enter into the foregoing stipulation.

.....,
Judge.

[Endorsed]: Filed November 29, 1948.

[Title of District Court and Cause.]

ANSWER OF ERNEST A. JONSON, RECEIVER OF VITA-PAKT ASSOCIATES, INC., TO PETITION AND ORDER TO SHOW CAUSE OF TRUSTEE OF ESTATE OF FAY J. HANSEN, BANKRUPT

Comes Now Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, by and through his attorneys, Johnson & Dafoe, and reserving his objections to the jurisdiction of the above-entitled court, and in response to the petition of the Trustee of the Estate of Fay J. Hansen, the above-named bankrupt, admits, denies and alleges as follows:

I.

Answering paragraph I thereof, respondent admits the same.

II.

Answering paragraph II thereof, respondent admits the same, except for that portion thereof alleging transfer therein referred to as having been made without any consideration therefor, which respondent denies.

III.

Answering paragraph III thereof, respondent admits the same.

IV.

Answering paragraph IV thereof, respondent de-

nies each and every allegation, matter and thing therein contained, except respondent admits that said transfer was made within one year prior to the filing of the petition in bankruptcy herein.

V.

Answering paragraph V thereof, respondent admits that all of the property, except as hereinafter described, the subject of said conveyance and transfer, was in the possession of the bankrupt at the time of his adjudication in bankruptcy and has been in possession of the Trustee of the Estate of said bankrupt; but alleges that the following described property was not in the possession of the said bankrupt at the time of filing said petition in bankruptcy, nor at the time of his aforesaid adjudication, nor has the same been in the possession of the Trustee:

> Unimproved real estate in Seattle, King County, Washington, being Lot 1, Block 3, Arroyo Vista Addition.

Shares of stock in Vita-Pakt Associates, Inc.

Wherefore, respondent prays for an order and decree of the above-entitled Court as follows:

1. That the following property be adjudged and decreed to be subject to a trust and equitable lien in favor of respondent, senior and prior to the claims of the bankrupt, his creditors, and the trustee of the estate of said bankrupt, as follows:

To the extent of $5500.00 in the residence property described as follows: Lot 22, Block 4 of Arroyo Vista, King County, Washington, known as 4113 S.W. 109th St., Seattle, Washington; and,

To the extent of $350.00, more or less, in the aforesaid 1948 Oldsmobile automobile; and

To the extent of $1500.00, more or less, in the aforesaid furniture, furnishings and fixtures located at the above residence.

2. That the aforesaid property be sold and said trust and equitable lien attach to the proceeds thereof and such proceeds to the extent of said trust and equitable lien be delivered by the trustee of the estate of said bankrupt to respondent.

3. That the balance of the proceeds or portion of said property remaining after adjudging of the aforesaid trust and equitable lien of respondent be apportioned and identified as to "exempt" and "non-exempt" property; and the non-exempt portion thereof be awarded to and retained by the trustee of the estate of said bankrupt.

4. That as to the exempt portion of said property or the proceeds thereof, an order be entered herein that the above-entitled court is without jurisdiction to determine conflicting claims thereto; that in the event the court asumes jurisdiction thereof, that the transfer thereof to respondent be confirmed and approved in all respects.

5. That an order and decree herein be entered that the above-entitled court is without jurisdiction to determine conflicting claims to the property hereafter described; that in any event it be decreed that the trustee of the estate of said bankrupt and said bankrupt have no title or interest in and to the following unimproved real property and personal property:

Lot 1, Block 3, Arroyo Vista, King County, Washington.

Shares of stock in Vita-Pakt Associates, Inc.

6. That the petition and prayer for relief of the petitioning trustee on file herein be dismissed with prejudice and without costs to respondent; that the said Order to Show Cause be dismissed and respondent discharged therefrom, and that respondent have, and receive his costs and disbursements herein to be taxed.

7. For such other and further relief in the premises as the Court may deem just and equitable.

/s/ JOHNSON & DAFOE,
Attorneys for Receiver.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 7, 1948.

[Title of District Court and Cause.]

REPLY OF BANKRUPT TO AFFIRMATIVE DEFENSES OF ERNEST A. JONSON

Comes now above-named bankrupt, and in reply to the Affirmative Defenses of Ernest A. Jonson, receiver, etc., denies each and every allegation contained therein, except those expressly admitted hereafter, to wit:

Admits the allegations of Paragraphs III and IV of said first affirmative defense.

As to said second affirmative defense, petitioner admits as follows:

That petitioner made an offer, which was accepted by said corporation, to turn over certain assets to said corporation, in return for which he was to receive 530 shares of the capital stock of said corporation, and said assets were in fact turned over to said corporation.

That said Elvin P. Carney did secure from petitioner and his wife certain deeds and bills of sale, as alleged in petitioner's petition herein, by threats of criminal prosecution, and extortion, without any consideration whatever.

That petitioner is the payee of the note described in Par. IX.

That said Ernest A. Jonson did enter into a certain stipulation with bankrupt and trustee herein, which is on file in this cause, upon authority granted him by the Superior Court of the State of Washington.

That petitioner and Rosemary A. Hansen are husband and wife.

Petitioner affirmatively alleges that the capital stock of said Vita-Pakt Associates, Inc., consisted of 1,000 shares, of which petitioner was the owner of 530 shares. That a total number of 790 shares of said stock was allotted by said corporation, which allotment included 530 shares belonging to petitioner. That 210 shares were not allotted, and were held as treasury stock by said corporation, and not sold or disposed of. That a total number of 615 shares of said stock were sold or otherwise disposed of; that of said number thus disposed of 355 shares were the property of petitioner. That the receipts for the sale of all of said stock were deposited in the bank account of the corporation subject to the right of petitioner to withdraw the proceeds of said sales of the stock belonging to him. That petitioner did withdraw from said funds a small portion of what belonged to him, to wit, the approximate sum of $6,500.00, as shown exactly by the books of said corporation now in possession of said Jonson.

Wherefore, petitioner prays for the relief requested in his petition herein.

/s/ ALEX WILEY,
Attorney for Bankrupt.

Duly verified.

[Endorsed]: Filed December 8, 1948.

[Title of District Court and Cause.]

MEMORANDUM DECISION

During the last half of 1947 Fay J. Hansen and one Paul Shafer were co-partners engaged in selling orange juice and agreed between themselves that as of January 1, 1948, the partnership would be dissolved. Shafer would retire from the business and Hansen would convey the assets to a corporation to be formed. On January 5, 1948, Vita-Pakt Associates, Inc., was organized.

In the interest of brevity short names instead of full titles and initials will be used.

At the first meeting of directors Hansen subscribed to 530 shares of the 1000 shares of non-par stock of the corporation, and by resolution of the Board paid for the same by executing a bill of sale to the assets of the partnership, the corporation agreeing to pay the liabilities of the partnership.

There was a resolution that non-par common stock of the corporation be issued for for not less than $100.00 per share. (Corporate Minute Book, Receiver's Ex. 2.)

There was no compliance with the Washington State Security Act, Remington's Revised Statutes 5853, and following sections, and there was no further resolution by the corporation for the sale of stock, nor indeed was a stock certificate issued to Hansen for the 530 shares of stock. Stock certificates were issued on regular printed forms and they were signed by the corporate officers, but the stubs

and other records of the company did not disclose against which stock the same should be charged or from which stock they were transferred.

Hansen was President and General Manager of the corporation and on the books of the corporation, under his direction, an account was set up designated "Capital Stock Sales" and also an account designated as "Fay J. Hansen Drawing Account" (Receiver's Ex. 27).

The books disclosed that 615 shares of stock were issued, 96 shares thereof as bonus stock and that total receipts from the sale of stock were $51,900.00. There was paid to Hansen and charged to the "Fay J. Hansen Drawing Account" about $16,298.71.

Hansen sold stock and procured loans for the corporation from a group of dentists and others by representing to them that a larger volume of orange juice was being sold than was in fact being sold; that the corporation was making a profit, whereas it was losing money and that it needed working capital to expand its business. All money so received by him was deposited in the corporation's bank account and he drew freely for his personal use and for payments upon his house, furniture and car from the corporation account because he said he felt that the money so deposited was for the sale of his stock and he, therefore, could have the company pay his personal bills from the proceeds of the sale of the stock. He knew the stock record was incomplete and irregular but said he expected some day to straighten it out.

Some of the groups of dentists who had bought stock and made loans to the company upon Hansen's misrepresentations became apprehensive and on July 24, 1948, employed an accountant to examine the books and by July 29, 1948, the accountant had reported to them and to the lawyer employed by them and the corporation that Hansen had gone into this venture without funds of his own; that all of the money he received was by borrowing from his friends or the sale of stock; that the corporation had never operated at a profit; that the volume of sales was less than 10% of that represented; that the corporation was and had been hopelesly insolvent and that Hansen was insolvent and was liable to creditors in large sums and was subject to criminal prosecution.

A conference was had between the lawyer, a representative of the dentists, the accountant and Hansen at which time it was pointed out that Hansen had violated the Securities Act of the State of Washington and was liable to prosecution therefor; that if he would turn over to the corporation everything he had it would make the stockholders feel better. From this statement Hansen inferred that if he turned over all his property to the corporation he might escape prosecution. At the suggestion of the conferees he went to his home, related to his wife what had happened and she believed that if she joined with him and executed the instruments demanded of Hansen he would not be prosecuted but that if she did not do so he would be arrested, jailed

and prosecuted. In this frame of mind they went to the meeting place and there executed

> Bill of Sale to the Oldsmobile Sedan (Receiver's Ex. 21-A).
>
> Quit-claim Deed to premises known as 4113 S.W. 109th St. (Receiver's Ex. 22-A).
>
> Purchaser's Assignment of Real Estate Contract (Receiver's Ex. 23).
>
> Bill of Sale to refrigerator and range and all other household property located at 4113 S.W. 109th St. (Receiver's Ex. 24).
>
> Assignment of stock in Vita-Pakt Associates, Inc. (Receiver's Ex. 25).

On August 5, 1948, Hansen, upon his voluntary petition, was adjudged a bankrupt. In his schedules he recited that the foregoing instruments were executed under duress and claimed not specific property but the right to receive from the proceeds of the sale of the property, a sum of money equal to his statutory exemptions. The Trustee elected by the creditors filed his report allowing the exemptions and the Referee entered an order approving the same.

About ten days thereafter Ernest A. Jonson was appointed Receiver of the corporation in a winding-up proceeding in the Superior Court of King County.

Hansen initiated these proceedings by petition and order to show cause why his exemptions should

not be set over to him. The Trustee filed his petition and order to show cause seeking to void the above conveyances on several grounds. The Receiver appeared specially and objected to the jurisdiction of the Court. Since said time all of the parties have stipulated that the Trustee may sell the property and their liens and claims may be transferred to the proceeds, and the Trustee has, with their consent, accepted bids and is now perfecting title to close the sales.

The pleadings of the parties will be deemed amended to be claims by them to receive all or part of the proceeds of the sale to which the evidence discloses them entitled.

The hearing just concluded upon the issues made and tried extended over a number of days, 55 exhibits were introduced and oral argument was presented by all parties on two separate days. A part of the proceedings was not stenographically reported but a part was reported by Merritt G. Dyer, a part by Bernard Ayres and a part by E. E. Lescher.

The following Memoranda of Authorities and Briefs have been submitted by the parties:

Trustee's Trial Brief and Memoranda of Authorities—submitted by Barker & Day and William J. Walsh, Jr.

Bankrupt's Brief—submitted by Alex Wiley.

Receiver's Memorandum of Authorities—submitted by Johnson & Dafoe.

Receiver's Supplemental Memorandum of Authorities—submitted by Johnson & Dafoe.

Receiver's Second Supplemental Memorandum of Authorities—submitted by Johnson & Dafoe.

Trustee's Supplemental Trial Briefs and Memorandum of Authorities—submitted by Barker & Day and William J. Walsh, Jr.

Bankrupt's Reply Brief—submitted by Alex Wiley.

The written briefs cited 142 authorities to support their several and alternate contentions.

The Referee has considered each and all of the briefs and the authority therein cited but, for obvious reasons, will not undertake to show wherein the facts in the cited cases were different and that the cited cases are distinguishable from the case at bar. For instance, in certain cases the states in which the matter arose grant absolute exemptions to certain property without any procedure, whereas in this state there is no property which is exempt (except possibly wearing apparel) unless some procedure is had to claim the same, and all property is subject to exemptions under certain circumstances. (See Remington's Revised Statutes, Section 563). The subject matter of some of the cases was securities rather than physical property and, therefore, recording statutes have no application and some states have no recording statutes. Other cases were decided before the passage of the Chandler Act in

1938, which Act imposed stringent restrictions upon the establishment of secret liens in bankruptcy.

The Referee will not undertake to answer all of the contentions and alternate contentions of the several parties seriatim, but an effort will be made to indicate the basis in fact and law upon which the decision rests.

I.

Exemption

The contention of the Receiver that a Trustee in Bankruptcy cannot recover from anyone exempt property conveyed by the bankrupt for any purpose, because title to exempt property does not pass to the Trustee and he has no interest in exempt property finds support in the cases cited by him where the property conveyed was at the time exempt either by reason of the law of the situs or because the proper proceeding had been taken to declare it exempt, whereas, in the case at bar, upon the date of the conveyances no declaration of homestead had been filed, no proceeding had been taken to claim any property exempt and if the conveyances were in effect a preference the Trustee has the right to recover and make his own sale and account for the proceeds according to law.

Remington's Revised Statutes of Washington, Sections 563, 637 and 552;

35 C. J. S. 138 and 155;

In re R. H. Elrod & Son, 215 Fed. 250;

Van Slyke v. Bumgarner, 177 Wash. 326;

1 Collier, 816;

4 Collier, 968 and 998.

II.

Consideration

The Referee proposed to each of the parties the following question and received their answers substantially as listed below:

"What was the consideration for the execution of the instruments of conveyance?"

The Bankrupt's answer was that they were executed under duress and, therefore, void.

The Trustee's answer was that they were for security of some kind and, therefore, voidable in bankruptcy.

The Receiver did not answer directly but from what he did say the Referee infers that his contention is that Hansen had wrongfully depleted the capital of the corporation and to right this wrong he should convey all of his property, but that a portion of the property was purchased in part by the company's money and hence Hansen was only trustee therefor and the conveyance as to that part would simply place the legal title with the equitable title.

The Referee finds, concludes and decides that the corporation took these conveyances as security at a time when it knew Hansen to be insolvent; that there was no present consideration and that

the property passed to the Trustee free of the lien sought to be created by the conveyances and the Trustee is free to attack them in these proceedings.

Section 60 of the Bankruptcy Act. (U. S. Code, Title 11, Chap. 6, Section 96);

Section 67 of the Bankruptcy Act. (U. S. Code, Title 11, Chap. 7, Section 107);

Vol. 3, Collier on Bankruptcy, 14 Ed., pages 975-982.

III.

Tracing Trust Funds

The receiver cites many cases in support of the contention that an officer of a corporation is a fiduciary officer and if he takes money belonging to the corporation and purchases property in his own name the corporation is the equitable owner thereof, and if he sells it a Court of equity would impress the transaction with a trust, forcing him to convey the property to the corporation or the proceeds received by him therefor. In that case to meet the demands of justice a court of equity will impress a trust ex malificio. There is no quarrel with that rule. 65 C. J. 224-225; Tucker v. Brown, 20 Wn. 2d 740.

The present contest in reality is between the creditors of the corporation and the creditors of Hansen. Both are innocent and, therefore, the recording statutes must be complied with and the burden of proof must be met by those who assert a trust.

The Receiver met the burden of proving that $4,500.00 was taken out of the bank account of the corporation and paid to one Taylor for building a house for Hansen's personal use on real estate standing in his name, and other transactions were proven with like clarity. However, Hansen contended that his personally owned stock had been sold, the proceeds of those sales were placed in the corporation's bank account and, therefore, when he was taking the money from the bank account he was taking his own money.

The evidence is conclusive that a portion of Hansen's stock was sold and the proceeds thereof placed in the corporation's bank account. The evidence is incomplete as to the exact amount of Hansen's stock sold or the exact amount of the corporation's unissued capital stock sold. Therefore, the Receiver did not meet the burden of proving with clarity and certainty the amount of the Trust fund to begin with. Before there can be a tracing there must be an established fund. It may be that the Receiver is entitled to an accounting and that accounting may show an indebtedness against Hansen.

The failure of the Receiver to establish the amount of money in the corporate bank account belonging to Hansen also denies his claim to a lien of $300.00 on the proceeds of the sale of the automobile and, furthermore, if he had a mortgage lien, or a mechanic's lien or any other kind of lien upon the personal property of Hansen the same is void

unless some public record is made thereof and the secret lien so claimed is void in bankruptcy.

Section 60 of the Bankruptcy Act, (U. S. Code, Title 11, Chap. 6, Section 96);

Section 67 of the Bankruptcy Act, (U. S. Code, Title 11, Chap. 7, Section 107);

Section 70 of the Bankruptcy Act, (U. S. Code, Title 11, Chap. 7, Section 110);

Vol. 3, Collier on Bankruptcy, 14 Ed., pages 975-982;

Tucker v. Brown, 20 Wn. 2d 740.

IV.

Election of Remedies

When the corporation exacted from Hansen and his wife a conveyance of Mrs. Hansen's separate property (Purchaser's Assignment of Real Estate Contract, Receiver's Ex. 23), title to the whole of the automobile, although its claim of lien through resulting trust was about 10% of its value, and all of the household furniture, whensoever and wheresoever purchased, it well knew that it was receiving title to property not purchased with corporate funds. The corporation, possessed of these facts, then and there made an election to take the position of a debtor and secure itself by these conveyances and forever estopped itself from asserting any right to impress a lien against, or title to, property as being purchased with its funds or the funds being traced into the property.

> "A man shall not be allowed to approbate and reprobate." 28 C. J. S., 1057.
>
> See also 28 C. J. S. 1077 and 1095.

In The Morris Plan, Industrial Bank vs. Schorn, 52 A. B. R. NS 805, decided April 23, 1943, the Court said at page 808:

> "Also in line is the well settled rule that property converted, embezzled, or otherwise taken by the bankrupt, or obtained by him by fraud, can be claimed from the bankrupt estate only so long as it can be definitely traced, with the consequence that an attempted repayment by the bankrupt prior to bankruptcy is a preference, except where made from the very property taken." (Many cases cited.)

An order may be prepared, served and presented upon notice providing:

1. That the Receiver's special appearance is overruled and that his claim for any proceeds of the sale of property is denied upon the merits, but that this order is without prejudice to the right of the Receiver, or any other person, to file herein a general claim.

2. That when the order has been entered confirming the sale of the assets, the bankrupt may apply to this court for an order for payment to him in money of his claim of exemptions, but that this order is without prejudice to the receipt of further testimony to determine the origin or the

source of all the funds in the hands of the Trustee so as to determine the right to exemptions, such as the amount received over and above encumbrances and expenses from the sale of the household furniture and the car claimed as an in lieu exemption, etc., and without prejudice to the right of the Court to fix the amount of the costs of these proceedings and the cost of sale, to be charged to the Bankrupt and deducted from his exemptions.

Dated at Seattle, December 30, 1948.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed December 30, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT ON ORDER TO SHOW CAUSE OF HEARING

The above-entitled matter having come on duly before the undersigned Referee in Bankruptcy, on orders issued on the petitions of Fay J. Hansen, bankrupt herein, and of R. C. Nicholson, trustee in bankruptcy of above-entitled estate, directing Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., a corporation, to show cause, if any he had, why certain transfers and conveyances executed by said Hansen in favor of Vita-Pakt Associates,

Inc., a corporation, should not be adjudged to be void; bankrupt appearing in person and by Alex Wiley, his attorney, and the trustee appearing in person and by Barker and Day and William J. Walsh, Jr., his attorneys, and said receiver appearing specially and thereafter filing his answer by Johnson and Dafoe and Carl Jonson, his attorneys, and said matter having been continued from time to time, and evidence having been adduced on behalf of all parties, and the Court having heard and considered the arguments and briefs of counsel for all said parties,

Now, therefore, the Court finds the facts to be as follows:

I.

During the last half of 1947 bankrupt and one Paul Shafer were copartners engaged in selling orange juice. They agreed between themselves that as of January 1, 1948, the partnership would be dissolved; Shafer would retire from the business; and Hansen would convey the assets to a corporation to be formed. On February 5, 1948, Vita-Pakt Associates, Inc., was organized. At the first meeting of directors Hansen subscribed for 530 shares of the 1000 authorized shares of non-par value stock of the corporation; and offered in payment for said stock to turn over to said corporation all assets of said copartnership business. By resolution of the Board of Directors of said corporation said offer was accepted; said assets were delivered to said corporation; and said corporation assumed and

agreed to pay the liabilities of the copartnership. There was no further resolution by the corporation for the sale of stock; nor was a stock certificate issued to Hansen for the 530 shares of stock. Certificates for 615 shares of stock were issued and disposed of, for which was received the total sum of $51,900.00. Stock certificates were issued on regular printed forms and they were signed by the corporate officers, but the stubs and other records of the corporation did not disclose against which stock the same should be charged or from which stock they were transferred. The records of said corporation show an allotment of 530 shares of its stock to Fay J. Hansen and 260 other shares of said stock, which allotment was dated and filed on June 25, 1948, in the office of the County Auditor of King County, Washington.

II.

Hansen was president and general manager of the corporation; and under his direction an account was set up designated "Capital Stock Sales" and also an account designated "Fay J. Hansen Drawing Account." Hansen sold stock and procured loans for the corporation. All money so received by him was deposited in the corporation's bank account; and he drew on said account some funds for his personal use. That in said "Fay J. Hansen Drawing Account" there was charged to said Hansen the total sum of $16,657.71. That of said total the item, "E. E. Kohl, $500.00," was an error, and

said charge should not have been made against Hansen.

III.

At the instance of a group of dentists who were stockholders, on July 24, 1948, an accountant was employed by the corporation to examine the corporate books and records. By July 29, 1948, Hansen had been told by the accountant that he had withdrawn money from the corporation without authority and said accountant had reported to said stockholders that said corporation had never operated at a profit; that said corporation was hopelessly insolvent; that Hansen was insolvent and was liable to creditors in large sums, and was subject to criminal prosecution. Hansen was summoned to the office of the lawyer for said stockholders, which meeting was attended by a representative of the said dentists, and the accountant, at which time Hansen was informed that he had violated the Securities Act of the State of Washington in failing to secure a permit to sell stock and was liable to criminal prosecution therefor; that if he would turn over to the corporation all the property of every kind that he owned, the stockholders would feel more kindly toward him. The lawyer for said stockholders insisted that he turn over all his property to the corporation, and told Hansen that as far as he (the lawyer) was concerned, the only thing that Hansen could do was to sign over everything he had. From these statements Hansen inferred that if he turned over all his property to the corporation he might

escape prosecution, but that otherwise criminal charges would be filed against him. At the request of said lawyer, Hansen went to his home, related to his wife what had happened as above set forth, and she believed that, if she joined with him and executed the instruments of conveyance demanded of Hansen, he would not be prosecuted, but that if she did not do so he would be arrested, jailed and prosecuted. When Hansen left the meeting to bring back his wife he believed that if he did not return someone would come out and get him.

IV.

In this frame of mind, Hansen and his wife returned to the office of the lawyer a short while after leaving same, and executed the following written instruments, to wit:

Bill of Sale to Oldsmobile sedan;

Quit-claim deed to premises known as 4113 S.W. 109th St.;

Purchaser's Assignment of Real Estate Contract;

Bill of Sale to refrigerator and range and all other household property located at 4113 S.W. 109th St.;

Assignment of stock in Vita-Pakt Associates, Inc. All of these instruments except the stock assignment were filed of record.

V.

On August 5, 1948, Hansen, upon his voluntary petition, was adjudged a bankrupt. In his schedules he recited that the foregoing instruments were executed under duress and were void. He claimed, not specific property but the right to receive from the proceeds of the sale of the property, a sum of money equal to his statutory exemptions. The trustee elected by the creditors filed his report allowing the exemptions and the Referee entered an order approving the same.

VI.

That at the time of his adjudication in bankruptcy Hansen had possession of all of said property covered by said conveyances, with the exception of the stock in Vita-Pakt Associates, Inc., and the purchaser's assignment of real estate contract, and thereafter delivered possession of all of said property, with said exceptions, to the trustee herein, who has ever since been in possession thereof.

VII.

On August 9, 1948, Ernest A. Jonson qualified as receiver of the said corporation, having been appointed receiver by the Superior Court of the State of Washington for King County, on petition of some of the stockholders and directors of said corporation. Said receiver paid $320.00 on the mortgage indebtedness to preserve the asset mortgaged.

VIII.

Hansen initiated these proceedings by petition and order to show cause why said transfers to Vita-Pakt Associates, Inc., should not be adjudged void as to both the trustee herein and Hansen. The trustee also filed his petition and obtained the issuance of an order to show cause directed to said receiver seeking to have the said transfers voided as to the trustee. The receiver appeared specially and objected to the jurisdiction of the Court, and thereafter answered, reserving his objection to the jurisdiction of the Court. Thereafter all of the said parties have stipulated that the trustee may sell the said property covered by said instruments of conveyance; and their liens and claims, if any, might be transferred to the proceeds of said sales, all as more particularly shown in said stipulation; and the trustee has, with the consent of all parties, accepted bids and is now perfecting title to close said sales of all of said property.

IX.

The pleadings of the parties will be deemed amended to be claims by them to receive all or part of the proceeds of the said sales to which the evidence discloses them entitled; and be deemed to be amended to embrace a petition of the trustee that the Refere's Order approving the allowance of bankrupt's exemptions be reconsidered and said exemptions be disallowed.

X.

That at the time of the execution of said instruments of conveyance to said corporation Hansen had not filed any declaration of homestead as to any property whatsoever, and no proceedings or acts of any kind had been taken by Hansen to claim any property whatever as exempt.

XI.

That Vita-Pakt Associates, Inc., took said conveyances from Hansen and wife as security at a time when it knew Hansen to be insolvent; that there was no present consideration given for said conveyances. That said conveyances covered all property of every kind and nature then owned by Hansen and his wife, as said corporation then knew, and were executed within one week prior to Hansen's adjudication in bankruptcy. That at the time of the execution of said conveyances Hansen was indebted to various creditors to the total extent of several thousand dollars. That the effect of such transfers would be to enable said corporation to obtain a greater percentage of its alleged claim than any other creditor of the same class.

XII.

That of the 615 shares of stock in said corporation which were sold or otherwise disposed of, a substantial though undetermined portion thereof belonged to Hansen. That the funds received from the sale of Hansen's stock, though deposited in the

account of Vita-Pakt Associates, Inc., belonged to and remained the property of Hansen. The receiver has failed to prove the amount of Hansen's personal stock which was sold and the amount of the corporation's unissued capital stock sold. The receiver has failed to prove that any of the money withdrawn from the corporation's bank account by Hansen and used by him for his personal uses did in fact belong to said corporation. The receiver did not meet the burden of proving with clarity and certainty the existence of any trust fund with reference to said funds withdrawn by Hansen and the amount of any such trust fund. The receiver has failed to prove that a trust has been created with reference to any funds so withdrawn by Hansen.

XIII.

When the corporation exacted from Hansen and his wife a conveyance of what the receiver claims was Mrs. Hansen's separate property, title to the whole of the automobile although its claim of lien through resulting trust was about ten per cent of its value, and all of the household furniture, whensoever and wheresoever purchased, it well knew that it was receiving title to property not purchased with corporate funds. The corporation, possessed of these facts, then and there made an election to take the position of a creditor and secure itself by these conveyances, and forever estopped itself from asserting any right to impress a lien against, or title to, property as being purchased with its funds or the funds being traced into the property.

XIV.

That R. C. Nicholson is the duly elected, qualified and acting trustee of the above-entitled bankrupt estate.

Dated at Seattle, Washington, this 17th day of January, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Title of District Court and Cause.]

CONCLUSIONS OF LAW ON SHOW-CAUSE HEARING

The above-entitled matter having come on duly before the undersigned Referee in Bankruptcy, on order issued on the petitions of Fay J. Hansen, bankrupt herein, and of R. G. Nicholson, trustee in bankruptcy of above-entitled estate, directing Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., a corporation, to show cause, if any he had, why certain transfers and conveyances executed by said Hansen in favor of said corporation, should not be adjudged to be void; bankrupt appearing in person and by Alex Wiley, his attorney, and the trustee appearing in person and by Barker and Day and William J. Walsh, Jr., his attorneys, and said receiver appearing in person and by Johnson and Dafoe and Carl Jonson, his attorneys, and evidence having been adduced on behalf of all parties, and

said matter having been continued from time to time, and the Court having heard and considered the arguments and briefs of counsel for all said parties, and having made and entered its findings of fact herein;

Now, therefore, from said findings of fact the Court concludes as a matter of law, as follows:

I.

That the special appearance of receiver Jonson should be overruled.

II.

That the transfers and conveyances as set forth in Paragraph IV of findings of fact herein are void.

III.

That said receiver is not entitled to any of the proceeds of the sale of said assets covered by said transfers except the sum of $320.00 which he paid on the mortgage indebtedness, but his right to file a general claim herein is not prejudiced in any way.

IV.

That bankrupt is entitled to claim exemption in said proceeds of sales as provided by the laws of the State of Washington, without prejudice to the receipt of further testimony to determine the origin or source of all of the funds in the hands of the trustee so as to prevent bankrupt from obtaining exemption out of funds the source of which was not property subject to exemption, and without

prejudice to the right of the Court to fix the amount and portion of the costs of these proceedings and the costs of sale which may be charged to the bankrupt and deducted from his exemptions.

V.

That the petition of the Trustee to have the Referee's Order approving the allowance of the bankrupt's exemptions set aside should be denied.

Dated at Seattle, Washington, this 17th day of January, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

SUPPLEMENTAL ORDER ON SHOW-CAUSE HEARING

The above-entitled matter having come on duly before the undersigned Referee in Bankruptcy, on motion of R. C. Nicholson, Trustee, and the Referee finding that the original Order on Show-Cause Hearing entered January 17, 1949, should be supplemented by adding thereto a further paragraph embracing the Referee's oral ruling that the Trustee's petition to set aside the bankrupt's exemptions should be denied, now, therefore, it is Ordered

I.

That the Order on Show-Cause Hearing entered herein January 17, 1949, be and the same is hereby supplemented by the addition of a paragraph numbered IV to read as follows:

The petition of the Trustee to have the Referee's Order Approving the Allowance of the bankrupt's exemptions set aside, is denied.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 11, 1949.

[Title of District Court and Cause.]

ORDER ON SHOW-CAUSE HEARING

The above-entitled matter having come on duly before the undersigned Referee in Bankruptcy, on orders issued on the petitions of Fay F. Hansen, bankrupt herein, and of R. C. Nicholson, trustee in bankruptcy of above-entitled estate, directing Ernest A. Johnson, receiver of Vita-Pakt Associates, Inc., a corporation, to show cause, if any he had, why certain transfers and conveyances executed by said Hansen in favor of Vita-Pakt Associates, Inc., a corporation, should not be adjudged to be void; bankrupt appearing in person and by Alex Wiley, his attorney, and the trustee appearing in person

and by Barker and Day and William J. Walsh, Jr., his attorneys, and said receiver appearing specially and thereafter answering in person and by Johnson and Dafoe and Carl Jonson, his attorneys, and evidence having been adduced on behalf of all parties, and said matter having been continued from time to time, and the Court having heard and considered the arguments and briefs of counsel for all said parties, and having heretofore made and entered its findings of fact and conclusions of law herein;

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows, to wit:

I.

That the following conveyances and transfers executed by bankrupt and his wife on July 29, 1948, in favor of Vita-Pakt Associates, Inc., a corporation, to wit:

Bill of Sale to Oldsmobile Sedan;

Quit-Claim Deed to premises known as 4113 S.W. 109th St.;

Purchaser's Assignment of Real Estate Contract;

Bill of Sale to refrigerator and range and all other household property located at 4113 S.W. 109th St. (which written instruments are filed as exhibits herein).

are Void; and that all of said property covered by such conveyances passed to the trustee herein, free

of any right, title, interest or lien sought to be created by said conveyances in favor of Vita-Pakt Associates, Inc., a corporation, and/or Ernest A. Jonson, receiver of said corporation, subject to bankrupt's right to claim exemption therein.

II.

That the special appearance made herein by said receiver is overruled; and that the claim of said receiver to any proceeds of the sale of any of said property is Denied upon the merits, except that said receiver is entitled to the sum of Three Hundred Twenty ($320.00) Dollars out of the proceeds of the sale of the real property known as 4113 S.W. 109th St., Seattle, Wash.; but that this order is without prejudice to the right of the receiver, or any other person, to file herein a general claim against the above-entitled estate.

III.

That when the order has been entered herein confirming the sale of the said assets, the bankrupt may apply to this Court for an order for payment to him in money of his claim of exemptions, but that this order is without prejudice to the receipt of further testimony to determine the origin or source of all the funds in the hands of the trustee so as to determine the right to exemptions, such as the amount received over and above encumbrances and expenses from the sale of the house-

hold furniture and the car claimed as an in-lieu exemption, and without prejudice to the right of the Court to fix the amount and portion of the costs of these proceedings and the costs of sale which may be charged to the bankrupt and deducted from his exemptions.

Dated at Seattle, Washington, this 17th day of January, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

[Endorsed]: Filed January 17, 1949.

[Title of District Court and Cause.]

MOTION FOR SUPPLEMENTAL ORDER ON SHOW-CAUSE HEARING

Comes now R. C. Nicholson, Trustee herein, by and through his attorney, William J. Walsh, Jr., and respectfully shows to the Court:

I.

That after a hearing, the Referee in Bankruptcy entered his Findings of Fact, Conclusions of Law, and Order on Show-Cause Hearing on January 17, 1949.

II.

That said Findings of Fact in Paragraph IX thereof recite that the pleadings of the parties will be deemed to be amended to embrace the Trustee's petition that the allowance of the bankrupt's exemption be reconsidered and disallowed.

III.

That said Conclusions of Law in Paragraph V thereof recite that the petition of Trustee to have the Order Approving the Allowance of the bankrupt's exemptions set aside is denied.

IV.

That no reference is made in the Order on Show-Cause Hearing to the effect that said petition was denied.

Wherefore, R. C. Nicholson, through his attorney, prays that for the purpose of perfecting the record and pleadings upon review, a Supplemental Order on Show-Cause Hearing be entered embracing the denial of the Trustee's petition in conformity with the Referee's oral ruling.

/s/ WILLIAM J. WALSH, JR.,
Attorney for R. C. Nicholson,
Trustee.

[Endorsed]: Filed February 9, 1949.

[Title of District Court and Cause.]

OBJECTIONS OF BANKRUPT TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER PROPOSED BY TRUSTEE AND RECEIVER

Comes now the bankrupt and objects to the Findings of Fact and Conclusions of Law and Order on Petition for Review proposed by the trustee in bankruptcy and the receiver of Vita-Pakt Associates, Inc., on the following grounds:

1. That all of the Findings of Fact of the Referee in Bankruptcy are supported by substantial evidence; and none of said Findings of Fact is clearly erroneous.

2. Bankrupt objects to this Court making Findings of Fact on issues not presented in any testimony before this Court and not supported by any evidence in the record certified to this Court by the Referee in Bankruptcy, because such Findings are not supported by any evidence.

3. Bankrupt objects to this Court picking and choosing bits of evidence in order to make Findings of Fact contrary to those of the Referee, because the Referee heard all the witnesses on all the issues and this Court did not.

4. Bankrupt objects to this Court making Findings of Fact based on any testimony given before this Court in this case, because this action did not present a situation authorizing this Court to call

witnesses and hear testimony; and because the bankrupt was entitled to have the petition for review heard on the record certified to this court by the Referee in bankruptcy.

5. That no petition for review of the Supplemental Order entered by the Referee in Bankruptcy on February 11, 1949, has ever been filed; and said Order has become a final order of this Court; and the question of bankrupt's exemptions has been determined and adjudicated by said Order, and the Order of the Referee of October 20, 1948.

6. That the Order Approving Bankrupt's Exemptions was entered by the Referee in Bankruptcy on October 20, 1948, and became res adjudicata as to said rights of exemption because no objection had been filed to trustee's report allowing said exemptions within the time allowed by law, and because no petition for the review of said Order of October 20, 1948, has ever been filed.

7. That the receiver of Vita-Pakt Associates, Inc., has failed to file any proof of claim as a creditor, secured or otherwise, against the above-named estate; and by reason thereof said receiver can have no valid claim to any assets of said estate in the possession of the trustee herein.

/s/ ALEX WILEY,
Attorney for Bankrupt.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 7, 1949.

[Title of District Court and Cause.]

BANKRUPT'S ADDITIONAL OBJECTIONS TO PROPOSED FINDINGS AND ORDER

Bankrupt hereby makes additional objections to the Findings of Fact, Conclusions of Law, and Order which the receiver and trustee have proposed herein, as follows:

I.

Objects to setting aside or vacating the order of the Referee in Bankruptcy herein, on the ground that such action is unauthorized in law, and is contrary to the law and all the evidence in the case, and that there is no evidence to sustain or warrant such order.

II.

Objects to the proposed finding of the Court that the transfers from bankrupt to Vita-Pakt Associates, Inc., were made voluntarily, and not under duress, because there is no evidence to sustain such finding.

III.

Objects to the finding of the Court that the transfers by bankrupt to Vita-Pakt Associates, Inc., were not made as security, because there is no evidence to sustain such a finding.

IV.

Objects to the finding that bankrupt misappropriated and used for his personal benefit the sum

of $16,157.71 of the funds of Vita-Pakt Associates, Inc., because such finding is contrary to the law and all the evidence in the case.

V.

Objects to the finding that bankrupt misappropriated the sum of $5,897.00 of the funds of said corporation and that such sum has been traced into the purchase of a house and car by bankrupt because there was no evidence to sustain such a finding, and there was no evidence that said funds did not belong to bankrupt instead of to said corporation.

/s/ ALEX WILEY,
Attorney for Bankrupt.

[Endorsed]: Filed October 17, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above matter having come on duly before the undersigned, one of the judges of the above-entitled Court, on Petition for Review from the order herein of Van C. Griffin, Referee in Bankruptcy, of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, and R. C. Nicholson, Trustee of the estate of the above-

named bankrupt; and Van C. Griffin, Referee in Bankruptcy, having duly and regularly filed the Referee's Certificate on Review and the respective parties hereto having duly and regularly filed their respective memoranda of points on review and answers and replies thereto; and the cause having come on regularly for hearing on said Petition for Review on the 13th day of May, 1949, the above-named bankrupt appearing by Alex Wiley, the said Trustee appearing by Barker & Day (William J. Walsh, Jr. of counsel) and the said Ernest A. Jonson, Receiver, appearing by Johnson & Dafoe (Carl A. Jonson of counsel); the Court having heard the respective arguments of counsel, and the Court having read and examined the Transcript of Testimony and Summary of Unreported Testimony taken before said Van S. Griffin, Referee in Bankruptcy, and having fully examined the records and files herein; and the Court having on its own motion called witnesses and taken additional testimony herein on the 25th and 26th days of August, 1949, and on October 17, 1949, and the Court being fully advised in the premises,

Now, Therefore, the Court makes the following

Findings of Fact

I.

That on August 5, 1948, Fay J. Hansen, the above-named bankrupt, on his voluntary petition, was adjudged a bankrupt. That thereafter R. C.

Nicholson was duly elected and qualified as trustee of the bankrupt estate of Fay J. Hansen, and has been ever since and now is the duly qualified and acting trustee of said estate. That before said Petition in Bankruptcy was filed the bankrupt had possession of the following described property:

1948 Oldsmobile automobile;

Residence property commonly known as 4113 S. W. 109th Street, Seattle, Washington, described as follows: Lot 22 Block 4, Arroyo Vista, Seattle, King County, Washington;

Unimproved real property described as follows: Lot 1 Block 3, Arroyo Vista, Seattle, King County, Washington;

Electric refrigerator and range and all household furnishings and personal property located at 4113 S. W. 109th Street, Seattle, Washington.

II.

That Vita-Pakt Associates, Inc., an insolvent corporation, was incorporated under the laws of the State of Washington as of February 4, 1948. That on August 4, 1948, Ernest A. Jonson was appointed temporary receiver of said corporation, said appointment being made permanent on August 9, 1948, and said Ernest A. Jonson qualified as such receiver and has been and now is the duly qualified and acting receiver of said corporation. That said corporation succeeded to the business and property of a partnership in which Fay J. Hansen, bank-

rupt, and one Paul Shafer were co-partners. That Fay J. Hansen promoted and organized the corporation, and he, his wife, Rosemary Hansen, and Thomas Todd, were the incorporators and first officers and directors. Fay J. Hansen served as Director, President and General Manager of the corporation and Rosemary Hansen served as Director and Secretary-Treasurer of the corporation, until July 29, 1948; Todd served as a director and first vice-president and was succeeded by one Dr. H. J. Burkhart.

That the authorized capital stock of the corporation was 1,000 shares of no par value. That pursuant to proceedings duly had, the Board of Directors of said corporation fixed a value of $100.00 per share and authorized the sale of the stock of the corporation at that price. That at or prior to the formation of the corporation, Hansen offered to transfer the assets of said co-partnership, subject to the liabilities thereof, to the corporation for 530 shares of stock; that said offer was accepted by the corporation by formal resolution. That said partnership was insolvent prior to the date of its dissolution on December 31, 1947. That no shares of stock were issued to Hansen save one qualifying share which was subsequently transferred to Dr. Burkhart.

IV.

That Fay J. Hansen dominated, controlled and managed the affairs of the corporation. That during the transactions hereinafter mentioned, no

formal action of the Board of Directors and no affirmative vote of the stockholders was taken with respect thereto, nor was any meeting held of the Board of Directors or of the stockholders which authorized, either directly or indirectly, the transactions hereinafter set forth. That Hansen controlled the books of the corporation, directed the opening entries, received the money for the sale of stock, caused the shares to be transferred, made the loans hereinafter detailed and performed the actions hereinafter stated on his own initiative and without the consent of the Board of Directors and/or the stockholders of the corporation.

V.

That prior and subsequent to incorporation, Hansen as President and General Manager of the corporation, sold 519 shares of the capital stock of the corporation to various buyers for a cash consideration of $51,900.00; that during said time, an additional 96 shares were donated to various individuals by Hansen as bonus shares. That during said time, Hansen borrowed money from stockholders and others on behalf of the corporation; that all moneys received from the sale of corporation stock were credited to the capital stock account appearing on the books of the corporation, and moneys received from the sale of the capital stock of the corporation were property of the corporation; that all moneys received from loans obtained by Hansen, acting on behalf of the corporation, were for the corpora-

tion's benefit, were its property and were entered in the corporation books of account. That all funds received from the sale of stock and from loans were deposited in the corporation bank account.

VI.

That prior and subsequent to incorporation, to on or about July 29, 1948, Hansen sold stock and obtained loans as hereinabove set forth; that to induce individuals to purchase stock and loan money to the corporation, Hansen represented to them that the corporation was solvent; that it was operating and maintaining its business on a profitable basis, and that its financial affairs were in order; that Hansen was drawing only a salary of $100.00 per week from the business; that all funds received from the sale of stock and from loans were needed for corporation purposes and working capital and would be used only for such purposes; that said representations were made to said prospective stockholders and lenders of money during the course of negotiations concerning the sale of stock and loans of money, and were relied upon by them and induced them to purchase stock and/or loan money to the corporation. That said representations were false representations of material facts and were made by Hansen to induce said individuals to buy stock and lend money to the corporation, and were known by Hansen at the time to be false and untrue.

VII.

That Hansen withdrew corporation funds from its bank account and appropriated for his personal use, without authorization of the Board of Directors or stockholders, and without their individual or collective knowledge or consent of Fay J. Hansen and his wife, the sum of $16,157.71, as set forth in detail in the Fay J. Hansen drawing account set up on the books of the corporation. That of said funds so unlawfully misappropriated by Hansen, the receiver of the corporation traced $5,897.00 of the same into property purchased by Hansen, and in his possession at the time of the filing of his petition in bankruptcy. That the finding of the sum of $16,157.71 in this finding VII shall not be res adjudicata as to any claim filed by the receiver.

VIII.

That on or about July 24, 1948, a small group of stockholders employed a lawyer and an accountant to investigate the affairs of the corporation; that said investigation for the first time disclosed the fact that Hansen had made unlawful appropriation of corporate funds in the sum above stated, and further disclosed the fact to be that the corporation was insolvent, and that it had not operated at a profit during any period of its existence. That said investigation disclosed the fact that of such funds in the sum of $16,157.71, the following moneys were appropriated by Hansen and were used by him for his own purposes as follows:

That on or about March 16, 1948, Hansen executed and caused to be delivered to himself a corporation check No. 595 in the sum of $1100.00 drawn on the corporation bank account and payable to himself.

That said check was deposited in his own personal bank account at the Seattle First National Bank (Broadway Branch) and thereafter his personal check in the sum of $1,000.00, payable to Herbert U. Taylor, was charged against said account; that said account at said time consisted principally of corporation funds in excess of $1000.00. The said Herbert U. Taylor was the vendor of the residence then being purchased by Hansen, being premises known as 4113 S. W. 109th Street, Seattle, Washington, described as follows: Lot 22, Block 4, Arroyo Vista Addition to Seattle, King County, Washington.

That thereafter, and on June 30, 1948, at a time when the corporation bank account was overdrawn, Hansen caused to be deposited therein funds borrowed on behalf of the corporation from stockholders, in the sum of $5,000.00, and on the same day Hansen caused to be issued by said bank a cashier's check No. 92058 in the sum of $4500.00, which sum was charged against the corporation bank account. Said cashier's check was made payable to H. Taylor, who was the vendor of the above-mentioned residence, and the total of said payments, being $5500.00, was applied by said Hansen and Taylor on the purchase price thereof.

That on April 15, 1948, when the credit balance in Hansen's personal bank account consisted solely of corporation checks drawn and charged against the corporation bank account and deposited in his personal bank account, Hansen withdrew therefrom by check the sum of $397.00 which was paid to Central Oldsmobile Company as part of the purchase price of Hansen's personal automobile.

IX.

That on or about July 29, 1948, a conference was had by and between the attorney and accountant employed by the small group of stockholders, and Fay J. Hansen, at which conference the affairs of the corporation were discussed in detail. The representations Hansen made to the stockholders and his unlawful appropriation of the corporation funds and the manner in which the same were spent, were discussed. At such conference it was suggested to Hansen that the stockholders of the corporation would feel more kindly toward Hansen and wife in the event they would transfer all of their property to the corporation. That Hansen left the conference and voluntarily returned with his wife; that Hansen and his wife, at the request of the attorney and accountant, voluntarily executed documents transferring all of their property to the corporation as follows:

Bill of Sale to 1948 Oldsmobile automobile;

Quitclaim deed to residence property being premises commonly known as 4113 S. W. 109th

Street, described as follows: Lot 22 Block 4, Arroyo Vista, Seattle, King County, Washington;

Purchasers' Assignment of Real Estate Contract covering unimproved real property described as follows: Lot 1, Block 3, Arroyo Vista, Seattle, King County, Washington;

Bill of Sale to shares of stock in Vita-Pakt Associates, Inc.;

Bill of sale to electric refrigerator and range and all other household furnishings and personal property located at 4113 S. W. 109th Street.

That said conveyances and transfers were voluntarily made on their part and pursuant to the moral and legal obligations of Hansen to return to the corporation property purchased with corporation funds and otherwise make restitution to the corporation. Said conveyances and transfers were not secured by threat of criminal prosecution nor promise that Hansen would escape prosecution if the same were made. Said conveyances and transfers were not induced by threats or coercion of representatives of the corporation or of any other person but were made at the request of representatives of the small group of stockholders of the corporation for the benefit of all stockholders. That said conveyances and transfers to the corporation were not made at the request of the corporation or its representatives, but were made at the request of representatives of a small group of stockholders.

The corporation or its agents never made a demand on the Hansens to do anything. That the Hansens did not meet the burden of proof that the transfers and conveyances were obtained under duress.

X.

That by virtue of the conveyance to the corporation of the real property commonly known as 4113 S. W. 109th Street, above described and by transfer of the Oldsmobile automobile, the corporation received property which in part had been purchased with its funds which were traced by the receiver from the corporation bank account as above set forth. That said property to the extent of said $5500.00 in the residence property and said $397.00 in the Oldsmobile automobile was at all times property of the insolvent corporation and was at no time the property of Fay J. Hansen, or of the bankruptcy estate of Fay J. Hansen.

XI.

That on August 5, 1948, Hansen on his voluntary petition was adjudged a bankrupt. In his schedules he recited that the foregoing instruments and conveyances were void and executed under duress and claimed statutory exemption in the property thereby conveyed. The trustee elected by the creditors and Hansen filed a petition for and an order to show cause was issued directed to Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., to appear and show cause why said conveyances were not void. That by stipulation by all parties hereto the sale of said real and personal property has

heretofore been effected. That during the pendency of this proceeding and prior thereto, the receiver of the insolvent corporation paid the sum of $320.00 on the principal and interest of the mortgage due on the real property commonly known as 4113 S. W. 109th Street, the Hansen residence, to preserve the same, and that this sum has been repaid to the receiver by the trustee of the estate of Fay J. Hansen, Bankrupt.

XII.

That the corporate receiver did not adequately trace corporate funds, if such they were, in the amount of $72.50 into a vacuum cleaner purchased by the bankrupt from Ernst Hardware Company, on $500.00 allegedly loaned by the bankrupt from corporate funds to one, Robert Shaffer, and evidenced by a promissory note executed by said Robert Shaffer to Fay J. Hansen personally, or into any other assets of the bankrupt estate.

XIII.

During the pendency of these proceedings and pursuant to stipulation by all parties hereto, a sale of the real and personal property scheduled and inventoried in bankrupt's estate was authorized to be made by the Trustee under the direction and subject to the approval of the Referee in Bankruptcy. The sale of these properties has been effected by the Trustee, and the net proceeds thereof deposited in the Trustee's bank account.

XIV.

That at the time of the transfer and conveyance of these properties to Vita-Pakt Associates, Inc., Hansen had not filed any declaration of homestead as to any property whatsoever, and no proceedings or acts of any kind had been taken by Hansen to claim any property whatever as exempt.

XV.

That Hansens voluntarily transferred and conveyed the afore-described property to the insolvent corporation; that they voluntarily chose to make such transfers and conveyances of property which they might otherwise have been able to claim as exempt; that said transfers and conveyances of said property were made within four months of the filing of the petition in bankruptcy by Hansen, and at a time when he was insolvent; that there was no present consideration for the making of said transfers or conveyances, and at the time the same were made, the corporation knew Hansen to be insolvent; that the effect of said transfers and conveyances was to enable the corporation to obtain a greater percentage of the amount owed by Hansen than others of the same class; that said transfers and conveyances, except to the extent of the funds therein as traced by the receiver, consisting of the aforementioned $5500.00 in the residence and $397.00 in the automobile, constituted a preference in favor of the corporation, voidable by the trustee of the estate of Fay J. Hansen, Bankrupt.

XVI.

That said transfers and conveyances were not made nor given as security of any kind nor did the same constitute a general assignment for the benefit of Hansen's creditors; that the same were made for the sole benefit of the corporation at a time when Hansen had other creditors; that the value of the property transferred and conveyed did not exceed the obligation owed Hansen by the corporation.

XVII.

October 20, 1948, the Trustee recommended and the Referee signed the Order Approving Trustee's Report of Exemptions; the exemptions allowed were those claimed by the bankrupt in his schedules, to wit: $4000.00 from the proceeds of the sale of Lot 22, Block 4, Arroyo Vista, pursuant to claim of homestead filed by the bankrupt August 4, 1949; $500.00 in lieu of household furniture and furnishings; and $250.00 in lieu of other personal properties that might have been claimed. These exemptions were asked to be paid in cash from the proceeds of the property transferred to the corporation, which property had not at the time of the allowance of exemptions been sold and reduced to cash.

XVIII.

More than ten days after the entry of the order allowing the bankrupt's exemption and during the pendency of the show cause hearing to set aside the transfers and conveyances to the corporation, the Trustee moved orally to amend his Petition on the

order to show cause to embrace a further petition that the Referee's "Order Approving the Trustee's Report of Exemptions" be reconsidered and the exemptions be disallowed. No rights had intervened and the bankrupt did not have possession of the exempt property during the interval between the entry of the Referee's original Order allowing the exemptions and the making of the petition to vacate said order.

XIX.

The Referee permitted the oral amendment, reconsidered and re-examined the merits of his original order of October 20, 1948, and thereafter denied the Trustee's petition to set aside the Referee's previous order approving the allowance of the bankrupt's exemptions.

XX.

That this Court of its own motion disallows the bankrupt's exemptions, and vacates the Referee's Order Approving the Trustee's Report of Exemptions dated October 20, 1948.

XXI.

That the amounts herein awarded to the Receiver should be subject to the proportionate share of costs of sale of the property into which the same were traced. That the allocation by the Trustee of the sum of $19,584.03 as the price received from the sale of the Hansen residence property is just and reasonable; that the equity therein of Fay J. Hansen is the sum of $8157.50. That the follow-

ing expenses of sale were reasonable and necessary expenses:

Title Insurance Policy	$ 63.75
Federal and State documentary stamps	42.00
Filing Fee—Recording Deed	.45
Real Estate Commission	1,000.00
	$1,106.20

That the amount herein awarded to the Receiver from the proceeds of the sale of said house; namely, $5,500.00, is 67.3% of said equity, and said sum is subject to 67.3% of the aforementioned costs of sale, or a total of $741.15. That the equity of Fay J. Hansen in the said 1948 Oldsmobile was $528.49; that storage charges pending sale were incurred in the sum of $59.20; that the amount herein awarded to the Receiver from the proceeds of sale of the said automobile; namely, $397.00, is 75.4% of the equity of Fay J. Hansen in said automobile and is subject to 75.4% of the costs of sale, or a total of $44.40.

XXII.

That in addition to the aforementioned costs of sale, the amount herein awarded to Receiver should be subject to a further charge for reasonable attorneys' fee to be awarded as a special attorneys' fees to Barker & Day and William J. Walsh, Jr., attorneys for the Trustee, for services rendered in connection with the sale of the aforesaid Hansen residence and automobile; that Van C. Griffin, Referee in Bankruptcy, has found that the sum of

$400.00 is a fair and reasonable amount to be awarded to said attorneys as special attorneys' fees and that said sum shall be allocated and borne as follows:

For services in connection with sale of automobile, the sum of $40.00. By receiver, $30.00.

For services in connection with sale of said residence, the sum of $360.00. By receiver, $241.20.

Done in Open Court this 1st day of November, 1949.

/s/ LLOYD L. BLACK,
Judge.

From the foregoing Findings of Fact, the Court now makes the following:

Conclusions of Law

I.

That this Court has jurisdiction of the subject matter and all the parties to this cause and the Order of the Referee in Bankruptcy overruling the special appearance of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., is affirmed.

II.

That the Findings of Fact of Van C. Griffin, Referee in Bankruptcy, entered in the above-entitled cause on the 17th day of January, 1949, to the extent that the same are inconsistent with the

Findings of Fact hereinabove made, are not supported by the evidence and are clearly erroneous and contrary to the law and evidence herein; that the Conclusions of Law entered simultaneously therewith are clearly erroneous and contrary to the law and the evidence herein; that the Order on show cause hearing of the said Van C. Griffin, Referee in Bankruptcy, is clearly erroneous and contrary to law and is not supported by his Findings of Fact and Conclusions of Law of this Court.

III.

That Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., an insolvent corporation, is entitled to receive the following amount from the funds on hand derived from the proceeds of the sale of the real and personal property herein mentioned:

> $5500.00 from the proceeds of the sale of the residence of Fay J. Hansen, commonly known as 4113 S. W. 109th Street, described as follows: Lot 22, Block 4, Arroyo Vista, Seattle, King County, Washington;
>
> $397.00 from the proceeds of the sale of that certain Oldsmobile automobile, the personal vehicle of Fay J. Hansen, Bankrupt.

That said funds constitute a first and prior lien against the proceeds of the sale of the above-described property in the hands of the Trustee of the Estate of Fay J. Hansen, Bankrupt, prior to the claims of said Trustee and any creditors of said

bankrupt, subject only to a charge in the sum of $785.55 to be deducted by and retained by the Trustee as the reasonable proportionate share of the costs of sale of said property to be borne by said receiver, and subject to the further charge in the sum of $271.20 to be deducted therefrom as a special attorneys' fee to be awarded to the attorneys for the trustee; that the balance of said proceeds in the sum of $4840.25 for the receiver shall not otherwise be subject to any charges and/or expenses of any kind in this proceeding or any other proceedings in the matter of the estate of Fay J. Hansen, Bankrupt.

IV.

That the transfers and conveyances to Vita-Pakt Associates, Inc., as hereinbefore set forth (except as to the extent of the part thereof into which the Receiver of Vita-Pakt Associates, Inc., traced corporation funds in the total amount of $5897.00); namely

Lot 22, Block 4, Arroyo Vista, King County, Washington;

Bankrupt's equity in Lot 1, Block 3, Arroyo Vista, King County, Washington;

Household furniture and furnishings formerly situate at 4113 S. W. 109th Street;

1948 Oldsmobile automobile;

were made at a time when no part of said properties had been claimed exempt and constituted a

voluntary preferential transfer by the bankrupt which was not made by way of security. Said transfers and conveyances prohibit the allowance of the bankrupt's claim to exemptions out of the property so transferred, and which was recovered for the benefit of the creditors by the Trustee, under the express terms of Section 6 of the Bankruptcy Act.

V.

That the Referee in Bankruptcy, having entertained and considered the Trustee's "Petition to Reconsider and Set Aside the Referee's Original Order Approving Trustee's Report of Exemptions dated October 20, 1948," should have vacated said Order, and denied the Bankrupt's claim to exemptions.

VI.

That this Court has the power to and should set aside the Referee's Order Approving Report of Trustee's Exemptions dated October 20, 1948, and of its own motion itself deny the Bankrupt his exemptions.

VII.

That the Trustee of the Estate of Fay J. Hansen, Bankrupt, is entitled to receive and retain the remainder of the proceeds from the sale of the assets of the bankrupt estate after deducting therefrom the aforesaid amounts to be paid Ernest A. Jonson, Receiver; and that the bankrupt and his wife are not entitled to an exemption or exemp-

tions from said proceeds, or from any other asset of the bankrupt estate.

VIII.

That except as herein otherwise specifically provided, neither party is entitled to recover costs or disbursements in this proceeding.

IX.

That the awards herein made and to be entered in favor of Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., should be without prejudice to the right, if any, of said receiver to file a general claim against the estate of Fay J. Hansen, bankrupt, for the balance of such funds as receiver may claim as an indebtedness due from said bankrupt.

Done in Open Court this 1st day of November, 1949.

/s/ LLOYD L. BLACK,
Judge.

Approved as to form:

/s/ WILLIAM J. WALSH, JR.,
Attorney for Trustee.

/s/ CARL A. JONSON,
Attorneys for Receiver.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1949.

[Title of District Court and Cause.]

ORDER ON PETITION TO REVIEW

The above matter having come on duly before the undersigned, one of the judges of the above-entitled Court, on Petition for Review from the order of Van C. Griffin, Referee in Bankruptcy, entered on January 17, 1949, of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, and of R. C. Nicholson, Trustee of the estate of the above-named bankrupt; and Van C. Griffin, Referee in Bankruptcy, having duly and regularly filed the Referee's Certificate on Review and the respective parties hereto having duly and regularly filed their respective memorandums of points on review and answers and replies thereto, and the cause having come on regularly for hearing on said Petition for Review on the 13th day of May, 1949, the bankrupt being represented by Alex Wiley, the Trustee being represented by Barker & Day (William J. Walsh, Jr., of counsel) and the said Ernest A. Jonson, Receiver, being represented by Johnson & Dafoe (Carl A. Jonson of counsel); the court having heard the respective arguments of counsel, and the Court having read and examined the Transcript of Testimony and Summary of Unreported Testimony taken before said Van C. Griffin, Referee in Bankruptcy, and having fully examined the records and files herein, and the Court having taken additional testimony herein on the 25th and 26th days of August, 1949, and on October 17, 1949, and having jurisdiction of the subject matter and parties to this cause

and having heretofore made and entered its Findings of Fact and Conclusions of Law herein, now therefore

It Is Hereby Ordered, Adjudged and Decreed that the special appearance of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., be and the same is hereby overruled; and

It Is Further Ordered, Adjudged and Decreed that the Order of Van C. Griffin, Referee in Bankruptcy, entered herein on January 17, 1949, be and the same is hereby reversed except as to that portion relating to the special appearance of the said Ernest A. Jonson; and

It Is Further Ordered, Adjudged and Decreed that Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, be and he is hereby awarded the sum of $5897.00 from the proceeds of the sale of the following real and personal property of Fay J. Hansen, Bankrupt:

> Residence of Fay J. Hansen, commonly known as 4113 S. W. 109th Street, described as follows: Lot 22, Block 4, Arroyo Vista, Seattle, King County, Washington;
>
> One certain Oldsmobile automobile, the personal vehicle of Fay J. Hansen, bankrupt,

in the hands of R. C. Nicholson, Trustee of the Estate of Fay J. Hansen, Bankrupt, pursuant to stipulation on file herein, representing the proceeds of property of Vita-Pakt Associates, Inc., a corporation, in the hands of said trustee, free and clear of any right, title, interest or lien or claim of any

kind of said R. C. Nicholson, Trustee of the estate of Fay J. Hansen, Bankrupt, and of Fay J. Hansen and his wife, and said sum is hereby established as a first and prior lien against the aforesaid proceeds in the hands of the said Trustee, subject only to reduction therefrom as follows:

The sum of $741.15 costs of sale of said real property and the sum of $44.40 costs of sale of said automobile, together with the sum of $271.20 as a special attorneys' fee for the attorneys for the trustee in connection with the sale of said property; that the balance of the award to said Receiver, namely, the sum of $4840.25, be and the same is hereby awarded to him without further charge of any kind for expenses of administration in the above-entitled bankruptcy proceedings, or any other costs and expenses of any kind in these proceedings or any other proceedings in said bankruptcy; and

It Is Further Ordered, Adjudged and Decreed that to the extent of the proceeds of property above described not otherwise determined to be the property of Vita-Pakt Associates, Inc., the conveyance and transfer of said property, as evidenced by documents executed by Fay J. Hansen, bankrupt, and wife, on July 29, 1948, constituted a preference of Vita-Pakt Associates, Inc., voidable by R. C. Nicholson, Trustee of the Estate of Fay J. Hansen, bankrupt herein, and said remaining property and proceeds thereof passed to R. C. Nicholson, Trustee herein, together with that certain promissory note executed by Robert Shafer, payable to Fay

J. Hansen, and together with the certain vacuum cleaner in possession of said Trustee, and the same is hereby awarded to him free of any right, title, interest or lien sought to be created in favor of Vita-Pakt Associates, Inc., an insolvent corporation and/or Ernest A. Jonson, Receiver of said corporation, and free of any right, title, interest and/or lien and/or claim of exemption of said Fay J. Hansen, bankrupt, or his wife; and

It Is Further Ordered, Adjudged and Decreed that this decree shall be without prejudice to the right, if any, of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, to file within the time and in the manner provided by law, a general claim against the estate of Fay J. Hansen, bankrupt, in such amounts which are surrendered by the aforesaid Receiver to the aforesaid Trustee as a result of this Decree; and

It Is Further Ordered, Adjudged and Decreed that the Order of Van C. Griffin, Referee in Bankruptcy, approving and allowing certain exemptions to the Bankrupt, be and the same is hereby vacated and the claim of Fay J. Hansen, Bankrupt, to exemptions be and the same is hereby denied; and

It Is Further Ordered, Adjudged and Decreed that the costs of sale in the sum of $785.55 charged against the amount herein awarded to the Receiver of Vita-Pakt Associates, Inc., be and the same shall be retained by R. C. Nicholson as Trustee of the estate of Fay J. Hansen, Bankrupt, as reimburse-

ment to said estate for the proportionate share of costs of sale of said Receiver as advanced by said estate, and the attorneys for said trustee are hereby awarded the sum of $400.00 as special attorneys fees in connection with the sale of the real and personal property hereinabove described, to be paid to them at the time and in the manner as determined by Van C. Griffin, Referee in Bankruptcy; and

It Is Further Ordered, Adjudged and Decreed that each party hereto shall bear its own costs and disbursements herein except as otherwise specifically provided; and

It Is Further Ordered, Adjudged and Decreed that this cause be and the same is hereby remanded to Van C. Griffin, Referee in Bankruptcy, for such further proceedings as are necessary to be had in said cause not inconsistent with the terms of this Order.

Done in Open Court this 1st day of November, 1949.

/s/ LLOYD L. BLACK,
Judge.

Approved as to form:

/s/ CARL A. JONSON,
Of Attorneys for Receiver.

/s/ WILLIAM J. WALSH, JR.,
Attorney for Trustee.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 1, 1949.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the bankrupt in the above-entitled cause, and moves the Court for a new trial herein for the following causes materially affecting the substantial rights of bankrupt:

I.

Irregularities in the proceedings of the Court by which bankrupt was prevented from having a fair trial.

II.

Insufficiency of the evidence to justify the decision. There was no evidence herein or inference from any evidence sufficient to justify:

1. Reversing or setting aside the Order of the Referee which was being reviewed herein, as such Order was not clearly erroneous, and there was ample and substantial evidence to sustain such Order.

2. The denial to the bankrupt of his statutory exemptions.

3. The award to the receiver of Vita-Pakt Associates, Inc., of any of the property or funds in the hands of the trustee.

4. The finding that all the funds obtained from the sale of the corporation stock of Vita-Pakt Associates, Inc., was the property of said corporation,

because the undisputed evidence proved that bankrupt owned a substantial part of said funds.

5. The finding that the transfers of property made by bankrupt and his wife to Vita-Pakt Associates, Inc., were made voluntarily and not under duress, because all the evidence proved said transfers were obtained by duress under threat of criminal prosecution.

6. The finding that the transfers by bankrupt to Vita-Pakt Associates, Inc., were not made by way of security, because the undisputed testimony proved otherwise.

III.

Errors in law occurring at the trial as follows:

1. The refusal of the Court to hold that the allowance of exemptions to bankrupt was res judicata.

2. The vacating of the Order of the Referee in Bankruptcy approving the trustee's Order allowing exemptions to bankrupt.

3. Denial of exemptions to the bankrupt.

4. The refusal of the Court to hold as valid the Supplemental Order of the Referee in Bankruptcy dated February 11, 1949, denying trustee's Petition to Set Aside the Order Approving the Allowance of Exemptions to Bankrupt, when no petition to review said Supplemental Order was ever filed.

5. The refusal of the Court to find that the re-

ceiver of Vita-Pakt Associates, Inc., has failed to file any proof of claim in above bankruptcy proceedings, and can have no valid claim to any of the funds in the hands of the trustee herein.

6. The calling of witnesses by the Court on his own motion when such action was not warranted by any circumstance in the case, and under such conditions that no party hereto considered it wise or proper to cross-examine said witnesses; and the hearing by the Court of only parts of the evidence on some of the issues involved, and picking and choosing bits of evidence in order to make Findings of Fact contrary to those of the Referee.

This motion is based upon the records and files herein, and the evidence submitted in said cause.

/s/ ALEX WILEY,
Attorney for Bankrupt.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

ORDER DENYING NEW TRIAL

Be It Remembered, this matter having come on regularly to be heard in open court on December 12, 1949, before the undersigned Judge of the above-entitled Court, upon the motion on file herein of Fay J. Hansen, bankrupt, for new trial; the bank-

rupt appearing by his attorney, Alex Wiley, the trustee of the estate of Fay J. Hansen, bankrupt, appearing by his attorneys Barker & Day (William J. Walsh, Jr., of counsel), and Ernest A. Jonson, receiver of Vita-Pakt Associates, Inc., an insolvent corporation, appearing by his attorneys, Johnson & Dafoe (Carl A. Jonson, of counsel); and the Court having heard and considered the arguments of counsel for the respective parties hereto and being full advised in the premises, Now, Therefore,

It Is Hereby Ordered that the motion of Fay J. Hansen, bankrupt, for new trial be and the same is hereby overruled and a new trial is hereby denied; and,

It Is Further Ordered that the exception of Fay J. Hansen, bankrupt, to this order be and the same is hereby allowed.

Done in Open Court this 16th day of December, 1949.

/s/ LLOYD L. BLACK,
Judge.

Prsented by:

/s/ CARL A. JONSON,
Of Johnson & Dafoe, Attorneys for Receiver of Vita-Pakt Associates, Inc.

Approved by:

/s/ WILLIAM J. WALSH, JR.,
Of Barker & Day, Attorneys for Trustee of the Estate of Fay J. Hansen, Bankrupt.

Approved as to form:

/s/ ALEX WILEY,
Attorney for Bankrupt.

[Endorsed]: Filed December 16, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Fay J. Hansen, Bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following parts of the Order on Petition to Review and Final Judgment entered in this action on November 1, 1949, to wit:

That part of said Order which reversed the Order of Van C. Griffin, Referee in Bankruptcy, allowing bankrupt his claimed exemptions.

That part of said Order which decreed that the bankrupt's property and the proceeds thereof were awarded to the trustee in bankruptcy herein free of any claim of exemptions of bankrupt.

That part of said Order which provided that the Order of the Referee in Bankruptcy allowing exemptions to bankrupt be vacated.

That part of said Order which denied bankrupt's claim to exemptions.

/s/ ALEX WILEY,
Attorney for Appellant
Fay J. Hansen.

[Endorsed]: Filed January 10, 1950.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL NOTICE OF APPEAL

Notice is hereby given that Fay J. Hansen, bankrupt above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order on Petition to Review and Final Judgment, and each and every part thereof, which was entered in this action on November 1, 1949.

/s/ ALEX WILEY,
Attorney for Appellant
Fay J. Hansen.

[Endorsed]: Filed January 14, 1950.

In the District Court of the United States for the Western District of Washington, Northern Division

In Bankruptcy No. 37835

In the Matter of

FAY J. HANSEN,

Bankrupt.

TRANSCRIPT OF THE PROCEEDINGS

Be It Remembered, that the above-entitled matter came on for hearing on the 29th day of No-

vember, 1948, beginning at the hour of 3:30 o'clock p.m., before The Honorable Van C. Griffin, Referee in Bankruptcy, at 600 United States Court House, Seattle, Washington.

WILLIAM J. WALSH, JR., ESQ., of
BARKER & DAY,
Appearing for R. C. Nicholson, Trustee;

CARL A. JONSON, of
JOHNSON & DAFOE,
Appearing for Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., a Corporation;

ALEX WYLIE, ESQ.,
Appearing for Fay J. Hansen, Bankrupt.

(Whereupon, the following proceedings were had and testimony taken to wit:)

(Papers presented to the Referee.)

FAY J. HANSEN

a witness called on behalf of the bankrupt, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wiley:

Q. Your name is Fay J. Hansen?

A. That is right.

(Testimony of Fay J. Hansen.)

Q. You are the bankrupt in this action?

A. That's right.

Q. Do you recall the occasion when in Mr. Carney's office you executed certain deeds and bills of sale? A. That is right.

Q. What did those cover?

A. Well, they covered an automobile, a house and furniture, and a lot. That's it.

Q. And that was to the Vita-Pakt Associates?

A. That is right.

Q. Do you remember when you executed those documents?

A. Well, it was one morning but the date of it I can't remember offhand. It was—well, I can't remember exactly the day because Mr. Carney took me to lunch.

Q. I am asking you the date now.

A. I can't remember that.

Mr. Wiley (Addressing Mr. Jonson): Will you admit that it was on July 29th?

Mr. Jonson: Yes.

Q. (By Mr. Wiley): Now, tell the Court the circumstances under which you executed those documents.

A. Well, I went to Mr. Carney's office as per Mr. Jonson's invitation and when I got down there we discussed the situation and——

Q. Well, now, tell us what was said—who was present?

A. Well, it was Mr. Carney, Mr. Jonson—I

(Testimony of Fay J. Hansen.)

can't think of his first name, but Mr. Jonson there, anyway—and at that time there was a discussion as to money that had been spent for other things in Vita-Pakt and I, at that time, told them that was my own stock that was sold. And then this stock deal was brought up and Mr. Carney said—of course, it had been brought out before at a previous meeting that we didn't have a license to sell stock and so he brought out that it was definitely a criminal offense.

Q. What was a criminal offense?

A. For selling stock without a permit. And he told me that in order for these stockholders to feel kinder towards us that he wanted me to go get my wife and come back to his office and sign over the property, all of our personal property—I mean all of our property, both real and all that, the house, lot, and a car, and everything in order that the stockholders would feel kinder towards me.

And I don't know exactly the particular words I used, but I asked him something to the effect, "Supposing if I didn't?" And he said, "Well, you go out and get your wife and get back here before noon or we will come out and get you and have you arrested," and at—"Or we will come out and get you." And so I called her—he said I would have to sign over the property in order to keep from being arrested.

And I called my wife from his office and—not that office we were in, but from the office right out-

(Testimony of Fay J. Hansen.)

side, and I told her to be ready, that I was coming out to get her, and that I wanted her to come in town with me. And I went out and got her and come back in.

Q. What did you tell your wife when you got her to bring her into town?

A. I told her we had to sign over our property to Vita-Pakt in order to keep from being arrested because they were going to have us arrested that afternoon if we didn't.

And so I brought her down there. We came in the office and we got back before noon and Mr. Carney, I believe, was dictating, or in preparation of dictating, to his girl there the deeds and etc. and, also, Dr. Burkhart and Dr. Dougherty were on their way from their offices to Mr. Carney's office, and we waited until they got there to execute these—this paper work, at which time we signed over the car, the house, the furniture, the lot, and we signed over our stock. And I gave up my office at Vita-Pakt. I resigned as president of the corporation.

Q. Did you have any other property at that time? A. No.

Q. Besides what you signed over? A. No.

Q. Did Mr. Carney know what property you had? Did he inquire from you as to what property you had? A. That is right.

Q. Then what did you tell him?

A. I told him what we had, and even to the lot that my wife had bought herself prior to us being

(Testimony of Fay J. Hansen.)

married. We had made payments on it after we were married.

Q. Did you owe any other debts, any debts of any kind at that time—or I might state this: Did you owe the debts that are listed in the bankruptcy proceeding at that time? A. That's right.

Q. Well, did Mr. Carney say anything about your owing Vita-Pakt any money?

A. Well, both Mr. Carney and Mr. Jonson brought out the fact that this drawing account of mine on the company books showed so much money drawn out, and I told them that that was my—money that—I explained the situation to them, why it was done that way, and so on, and so forth. And I also explained to them the manner in which we issued the stock, and I also explained to Mr. Jonson, the Auditor, when he first audited the books, the way the stock was issued, and the manner in which it was issued. And so——

Q. Well, was anything said about a jail sentence or criminal prosecution?

A. Yes, the fact that we went ahead and sold stock without a permit.

Q. Were you accused of any other crime except that of selling stock without a permit?

A. No.

Q. And what was your purpose in executing these transfers, then, at that time in Mr. Carney's office? Why did you do it?

A. Well, I did not want to go to jail, for one

(Testimony of Fay J. Hansen.)

reason, and that's the reason and the only reason, as far as that is concerned.

Q. Didn't you talk to Dr. Burkhart at the time you signed these?

A. No. At the time we signed this paper work, I asked Dr. Dougherty—I directed a question to him similar to this: I asked Dr. Dougherty, "Do you feel it necessary that we have to sign this car over?"

Mr. Jonson: Objection, if Your Honor please.

The Referee: I beg your pardon?

Mr. Jonson: I object if he is going to say what Mr. Dougherty said.

The Referee: In Mr. Carney's presence?

The Witness: Yes, in Mr. Carney's presence.

The Referee: You may answer.

A. He said I should definitely sign it over, that the people would feel much kinder toward you if you did.

Q. Was Dr. Dougherty a stockholder in Vita-Pakt Associates? A. That is right.

Q. And then you left, and you got your wife?

A. No. The paper work wasn't all drawn up yet, and as long as we had given everything to Vita-Pakt, except about $5.31 which we had in our pockets, Mr. Carney took us all to lunch, and after lunch we came back and finished signing the paper work.

Q. How long was it from the time they first

(Testimony of Fay J. Hansen.)

asked you to make this transfer until you brought your wife up there and signed?

A. About an hour, I imagine, elapsed—well, no, maybe—it takes about twenty minutes or thirty minutes to go from Mr. Carney's office to the house and back and I was probably in Mr. Carney's office approximately twenty or thirty minutes prior to that.

Q. Did Mrs. Hansen ask Mr. Carney anything about why she had to sign that over?

A. No, I don't believe so. She was just present there. She was also present in the office when I spoke to Dr. Dougherty about the car situation.

* * *

Cross-Examination

By Mr. Jonson:

Q. They did not mention that?

A. No. I explained to them that so much of that stock was mine, and so much of it was corporation stock.

Q. You may recall in your prior testimony at the creditor's hearing here that you did not tell the stockholders that it was your stock. Do you recall that?

A. I don't think—that is right. I never made any distinction to the stockholders, whether it was Vita-Pakt stock or "Joe Blow" stock, as far as that is concerned.

Q. Except for bonus stock?

(Testimony of Fay J. Hansen.)

A. Yes, bonus stock I told them would be my own stock.

Q. So, they could then believe that the other stock was corporation stock?

A. No, that wasn't the intention of it at all. The question had been brought up by several people, "How come Joe gets bonus stock and I don't?" And I explained it to them, that was my stock, that the stock is strictly $100 a share and it didn't make any difference who bought it or what it was all about, it was still $100 a share and the bonus was coming out of my own and not company stock and it was my own affair and I could give it to whomever I wanted. But, to be sure, we sat down a sort of regulation and I did it that way and I stuck to it.

Q. Now, did they also mention the fact that you had misrepresented to the doctors the earning capacity and the financial condition of this company?

A. No. The financial condition of the company was known by Dr. Burkhart.

Q. Did Mr. Carney and Mr. Jonson talk to you about that?

A. I don't recall anything about the financial condition of the company. The financial condition of the company was no secret to anybody anyway.

Q. Did Mr. Carney and Mr. Jonson talk to you about that? That is my question.

A. Not that I know of.

(Testimony of Fay J. Hansen.)

Q. Did they at any prior meeting at which Mr. Jonson or Mr. Carney was present?

A. The only prior meeting at which the two were present, and at which I was also present, was on a Saturday morning in my office there at the Vita-Pakt plant and that meeting was when I told a group of these stockholders whom I had appointed as an advisory committee to work with me on the situation the actual facts of the corporation.

Q. And was Mr. Jonson and Mr. Carney then present?

A. They came after part of the meeting. I believe Mr. Carney came first and Mr. Jonson second.

* * *

Q. (By Mr. Jonson): This meeting on the Saturday you referred to, where Mr. Jonson and Mr. Carney were present, was any discussion had at that time as to representations you had made with respect to the earning capacity of the company and what the actual earning capacity was?

A. There—there was something brought up but I can't remember exactly what the whole thing was on that.

Q. Could it have been brought out that you had represented to the stockholders that there was a production of some five to seven hundred gallons of orange juice a day when, as a matter of fact, it was only about two hundred gallons?

A. That could have been brought out.

Q. And at that time you admitted the discrep-

(Testimony of Fay J. Hansen.)

ancy between your representations to the stockholders and the actual facts? In other words, you admitted that you represented to the stockholders that the production was five or seven hundred gallons of orange juice a day and that, therefore, a substantial profit was made when, as a matter of fact, it was two hundred and the corporation was showing a loss?

A. I believe there was something to that effect, yes.

Q. That was correct. So to get back to the meeting, when you told Mr. Carney and Mr. Johnson about the fact that this stock was your stock, didn't they then tell you, "Well, how can you say that when you told the doctors that you were selling corporation stock and that the purpose was——"

A. I never told anybody what stock was going to be sold.

Q. All right. Did you tell them what the proceeds would be used for?

A. No, not all of them. In some cases, yes.

Q. What did you tell them?

A. I told them in some cases there—we had a meeting there, and a few days prior to this, and sold $4,700 worth of stock and I told them that we had to have the money for the corporation.

Q. For the corporation?

A. That's right. There was $4,000 worth of stock, I believe, sold there at that meeting—something like that.

(Testimony of Fay J. Hansen.)

Q. How do you distinguish among the various shares of stock that were sold? What was your stock and what was the corporation stock?

A. Well, the corporation had so much stock that belonged to it and that's the way it was kept. There was a sheet kept and our stock books were kept up as to which stock was which. And there were little initials put there, for instance, bonus share came out of this. I believe that was the way it was kept track of.

Q. What was done with the proceeds of this stock after you sold it?

A. It went into the corporation.

Q. And it was used in the corporation business?

A. That's right.

Q. So then if your particular stock were sold, you didn't receive the proceeds?

A. No, the stock—this is a breakdown on the stock roughly, as best I can remember it right now, and it was brought out at the first stockholders' meeting. We never had a real official stockholders' meeting.

When I speak of meetings, stockholders were there, more than ten or fifteen stockholders, and the breakdown was given to them. There was roughly to be approximately around sixty-nine or seventy-nine thousand dollars' worth of stock to be sold and issued in all, of which a certain portion of that was mine and a certain portion of that was Vita-Pakt's.

(Testimony of Fay J. Hansen.)

Q. And how was that identified as yours?

A. Well, in the Minutes of the Corporation the original thing there showed how many shares of stock would be Vita-Pakt's and how many shares of stock would be mine and, also, I will go on and finish there. There was supposed to have been something like twenty-one or thirty-one $100 worth of stock that was not to be issued or sold at this time at all and it was to be held not as treasury stock but just unissued stock.

* * *

Mr. Jonson: Will you mark this?

The Referee: That will be Receiver's Exhibit Number 2 for identification.

(Exhibit referred to marked Receiver's Exhibit Number 2 for identification.)

The Referee: I guess we will number these consecutively.

That is the corporate book there and the Minutes and so forth?

Mr. Jonson: Yes, sir.

The Referee: That is Number 2.

And the Capital Books—are these all Capital Stock Books?

Mr. Jonson: Yes, sir.

The Referee: They will be 3, 4, 5, and 6 for identification.

(Exhibits referred to marked Receiver's Exhibits 3, 4, 5 and 6 for identification.)

(Testimony of Fay J. Hansen.)

Mr. Jonson: Here is one more, Your Honor.

The Referee: That will be Exhibit 7.

(Exhibit referred to marked Receiver's Exhibit Number 7 for identification.)

Q. (By Mr. Jonson): Now, handing you what has been marked as Receiver's Exhibit 2, I will ask you if that is the Minute Book that you just were referring to in connection with starting the corporation? A. That is right.

Mr. Jonson: Do you have any objection to their being admitted in evidence?

Mr. Wiley: I have no objection.

The Referee: If there is no objection, they will all be admitted.

(Documents heretofore marked Receiver's Exhibits 1 to 7, inclusive, were received in evidence.)

(Testimony of Fay J. Hansen.)

RECEIVER'S EXHIBIT No. 1

Individual or Corporation Financial Statement
(Short Form)

Name: Vita-Pakt Associates, Inc., Date: July 22, 1948.
Address: 2710-12 2nd Ave., Seattle, Wash.
To The Bank of California, N. A.

For the purpose of obtaining advances from time to time on bills, notes and other commercial paper signed or endorsed by the undersigned, and of obtaining credit generally, the undersigned makes the following statement of ——financial condition as of the close of business on the——day of——— 19—, and certifies to the above-named bank that the information hereinafter set forth is in all respects true, accurate and complete and correctly reflects the financial condition of the undersigned on the date aforementioned.

(Fill all blanks, writing "no" or "none" where necessary to complete information.)

Assets		Liabilities	
Cash on hand and in banks	$ 1,500.00	Notes payable to banks (see schedule)	$ 1,000.00
Notes receivable	2	Notes payable to others (see schedule)	
Accounts receivable	9,400.00	Accounts payable (see schedule)	11,793.37
Merchandise	13,600.00	Taxes due	900.00
Life insurance—cash surrender value		Rent due	
Securities (see schedule)		Loans against life insurance	
Other current assets (itemize)		Accrued expenses	
Real estate (see schedule)		Chattel mortgages	
Machinery, furniture and fixtures	27,566.37	Real estate mortgages	
Prepaid expenses—lease deposits	4,970.38	Reserves (itemize)	
Other assets (itemize)—lease improvements	3,970.81	Other liabilities (itemize)	
Total	$61,007.56	Total liabilities	$ 13,693.37
		Net worth (if not incorporated)	
		Capital stock (if incorporated)	$100,000.00

Common 1,000 shares $100. par.
Surplus 470 shares surplus and to be sold.

(Testimony of Fay J. Hansen.)

Vita-Pakt Associates, Inc.
2710-2nd Ave. - Seattle 1, Wash.
Phone ELliott 6044

Distributors of
Vita-Pakt Brand Fresh Orange Juice

July 22, 1948

Cost Analysis

	Qts.	Pts.	½ Pts.
Juice—Cost plus freight	.1665	.0832	.0416
Bottles—Cost plus freight	.0337	.0228	.0165
Caps—Cost plus freight	.0028	.0028	.0028
Packing Cases—Cost plus freight	.0086	.0045	.0002
	.2116	.1133	.0611

Profit Analyzed—Basis 500 Gallons Daily
500 Qts. — 1000 Pts. — 500 ½ Pts.

	Qts.	Pts.	½ Pts.
Sales Priee	.35	.18	.10
Cost	.2116	.1133	.0611
Gross Profit	.1384	.0667	.0389
Daily Output	500	1000	500
Total Daily Gross Profit	$69.20	$66.70	$19.45
		$155.35	
Daily Average Expense		129.80	
Daily Net Profit		$ 25.55	

(Testimony of Fay J. Hansen.)

July 7, 1948

Average Monthly Expenses

Rent—Building		$345.00
Lease Juice Extracting Machines		600.00
Heat (average winter time—$31.93)		15.00
Light (average winter time—$22.56)		15.00
Telephone		70.55
Water (3 mos. average)		2.33
Towel & Uniform Service		11.13
Gas—Trucks		100.00
Industrial Insur. & Med. Aid		39.00
Shop Expense (Supplies)		20.00
Office Expense (Supplies)		10.00
Total		$1228.01

Taxes

F.O.A.B.—Employer—1% of wages	$24.96
State & Fed. Unempl. Tax—3% of wages	74.88
City Bus. Tax—.001 of sales (on sales $20,000.00)	20.00
State Excise Tax—.0025 of sales (on sales $20,000.00)	50.00
City Personal Property Tax	-------
Total	$ 169.84

Wages

R. Shafer	$73.50 per wk.	$318.50 per mo.
Tony Koch	68.50 per wk.	296.83 per mo.
Glenn Johnson	68.50 per wk.	296.83 per mo.
Dick Lindberg	68.50 per wk.	296.83 per mo.
John Bisig	68.50 per wk.	296.83 per mo.
Dick Shafer	68.50 per wk.	296.83 per mo.
Eve Johnson	58.50 per wk.	253.50 per mo.
Fay Hansen	100.00 per wk.	440.00 per mo.
Total		$2496.15
Total		$3894.00
Daily average		$ 129.80

Admitted.

(Testimony of Fay J. Hansen.)

RECEIVER'S EXHIBIT No. 2

Vita-Pakt Associates Incorporated
Stock Subscription

The undersigned herewith subscribes to 530 shares of the no par value common stock of Vita-Pakt Associates, Incorporated, a Washington corporation, and in consideration of the issuance thereof offers to transfer to the corporation the following:

All of the business presently operated as Vita-Pakt Associates at 2710 Second Avenue, Seattle, Washington, which includes, among other assets, the bank account, petty cash, inventory, accounts receivable, equipment and trucks, furniture and fixtures, lease improvements, prepaid lease on juice extracting machine, prepaid rent on the building at the above address, prepaid insurance, goodwill and all other assets of the business of whatsoever kind of nature and where situated, subject to the assumption by the corporation of contracts payable and any other liabilities of the business as presently operated by the undersigned.

Dated this 4th day of February, 1948.

/s/ FAY. J. HANSEN.

The above subscription is consented to.

/s/ ROSEMARY A. HANSEN.

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

Vita-Pakt Associates Incorporated
Stock Subscription

The undersigned herewith subscribe to the number of shares of stock of Vita-Pakt Associates, Incorporated, a Washington corporation, for the considerations set forth below:

Name	No. of Shares	Consideration
Rosemary A. Hansen	1	$100.00
Thomas Todd	1	$100.00

Dated this 4th day of February, 1948.

/s/ ROSEMARY A. HANSEN.

/s/ THOMAS TODD.

The undersigned herewith assign the above subscription to Fay J. Hansen who assumes liability thereon by acceptance.

/s/ ROSEMARY A. HANSEN.

/s/ THOMAS TODD.

Accepted:

/s/ FAY J. HANSEN.

(Testimony of Fay J. Hansen.)
Receiver's Exhibit No. 2—(Continued)

By-Laws of
Vita-Pakt Associates, Incorporated

Article III.

Stock

1. Certificates of stock shall be issued in numerical order, and each shareholder shall be entitled to a certificate signed by the President or Vice-President and the Treasurer or Secretary certifying to the number of shares owned by him.

2. Transfers of stock shall be made only upon the transfer books of the corporation, kept at the office of the corporation, and before new certificates are issued the old certificate shall be surrendered for cancellation.

3. Registered shareholders only shall be entitled to be treated by the corporation as the holders in fact of the stock standing in their respective names, and the corporation shall not be bound to recognize any equitable or other claim to or interest in any share on the part of any other person, whether or not it shall have express or other notice thereof, except as expressly provided by the laws of the State of Washington.

4. In case of loss or destruction of any certificate of stock, another may be issued in its place upon proof of such loss or destruction, and upon

(Testimony of Fay J. Hansen.)
Receiver's Exhibit No. 2—(Continued)

the giving of a satisfactory bond of indemnity to the corporation in such sum as the Board of Directors may provide.

Vita-Pakt Associates, Incorporated

Minutes of First Meeting of Board of Directors

Pursuant to waiver of notice the first meeting of board of directors of the above corporation was held at 682 Dexter Horton Building, Seattle, Washington, on the 10th day of February, 1948, at 1 p.m. o'clock. All of the directors attended.

Fay J. Hansen was elected chairman of the meeting and Thomas Todd was elected secretary thereof.

On motion duly made and seconded the action of the incorporators in filing the Articles of Incorporation and approving the By-Laws was ratified and confirmed.

On motion duly made and seconded the following were successively elected as officers of the corportion: Fay J. Hansen, President, and Rosemary A. Hansen, Secretary-Treasurer.

On motion duly made and seconded the following resolution was adopted:

> "Resolved that the Bank of California, Seattle Branch, be the depository for the funds of the corporation and that the officers of the corporation be authorized and directed to execute the bank's printed forms showing the authorization of either of the officers of the cor-

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

poration to sign checks and to borrow funds on behalf of the corporation. Be it also resolved that upon the execution of such forms copies thereof be placed in the Minute Book of the corporation."

On motion duly made and seconded it was

"Resolved that the no par common stock of the corporation be issued for money or other consideration of a value of $100.00 per share."

After a discussion of the stock subscription of Fay J. Hansen for 530 shares, during which the assets, good will and earning capacity of the business were discussed, it was

"Resolved that the subscription of Fay J. Hansen be accepted and that appropriate stock certificates be issued upon receipt of a bill of sale from Fay J. Hansen approved by Rosemary A. Hansen, his wife, including a transfer of the assets in question and it was also resolved that upon receipt of such bill of sale the corporation accept the liabilities set forth in the subscription."

There being no further business the meeting was adjourned.

/s/ THOMAS TODD,
Secretary.

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

Report and Statement as to Shares of Vita-Pakt Associates, Incorporated

The total number of shares of the above corporation allotted up to the date of this report is 790 shares of no par value common stock.

An accurate detailed and itemized description of the consideration received or to be received in payment for shares allotted is as follows:

No. of Shares	Consideration
530	Assets and good will of former business conducted under the name Vita-Pakt Associates by Fay J. Hansen, valued at.....$53,000.00
260	26,000.00
790	$79,000.00

Dated this 25th day of June, 1948.

/s/ FAY J. HANSEN,
President.

/s/ ROSEMARY A. HANSEN,
Secretary-Treasurer.

Resignation of Director

Thomas Todd herewith tenders his resignation as Director of Vita-Pakt Associates, Incorporated.

Dated this 9th day of February, 1948.

/s/ THOMAS TODD.

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

Minutes of Meeting of Board of Directors of Vita-Pakt Associates, Incorporated

Pursuant to waiver of notice a meeting of the board of directors was held at 2710-2nd Avenue, Seattle, on March 1st, 1948, at 11 a.m. o'clock.

Attending were Fay J. Hansen and Rosemary A. Hansen.

On motion duly made and seconded, it was resolved that the resignation of Thomas Todd as director was accepted.

On nomination Dr. H. S. Burkhart was unanimously elected to fill the vacancy left by Mr. Todd, to serve for 1 year or until his successor is elected.

/s/ ROSEMARY HANSEN,
Secretary.

The undersigned herewith waive notice of the above meeting.

/s/ FAY J. HANSEN,

/s/ ROSEMARY A. HANSEN,

/s/ THOMAS TODD.

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

Affidavit of Value of Assets to be Received for Non-par Value Stock

State of Washington,
County of King—ss.

Fay J. Hansen, being first duly sworn, upon oath deposes and says: That he is one of the incorporators of Vita-Pakt Associates, Incorporated.

That to the best of his knowledge and belief, the value of assets for issuance of its non-par value stock, does not exceed the sum of $100,000.00.

Dated this 4th day of February, 1948.

/s/ FAY J. HANSEN.

Subscribed and sworn to before me this 4th day of February, 1948.

[Seal]: /s/ RUSSELL V. HOKANSON,
Notary Public in and for the State of Washington,
Residing at Seattle.

Admitted.

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 2—(Continued)

Vita-Pakt Associates, Inc.
Profit & Loss Statement April 30, 1948

Sales			$3390.49
Cost of Sales			
Inventory	$4429.22		
Purchases	3299.63		
	$7728.85		
Less Purchase Discounts	3.68		
	$7725.17		
Inventory 4/30/48	2314.42		
	$5410.75		
Samples: 31 Qts. @ .4666	14.46		
34 Pts. @ .2394	8.14		
342 ½ Pts. @ .1245	42.58	$ 65.18	
Cost of Goods Sold		$5345.57	$5345.57
Loss on sales for April			*$1955.08*
Plus cost of samples			*65.18*
Loss			*$2020.26*

Direct Labor

Robt. E. Shafer	$161.00	
Tony Koch	299.50	
Harold G. Johnson	299.50	
Dick Lindberg	299.50	
John Bisig	299.50	$1359.00

Office & Administrative Salaries

Robt. E. Shafer	$161.00	
Eve Johnson	249.00	
Fay J. Hansen	450.00	860.00
Total Wages & Salaries		$2219.00

(Testimony of Fay J. Hansen.)

Receiver's Exhibit No. 7—(Continued)

Operating Expenses

Shop Expense	$877.20	
Truck Expense	220.68	
Office Expense	116.24	
Travel Expense	304.95	
Storage & Rent	313.20	
Rental—Juice Extr. Machines	600.00	
Advertising Expense	120.06	
Insurance on Equipment	25.88	
Bank Charges	10.00	
Interest	253.52	
Miscellaneous Expense	2.50	
Licenses	24.25	
F.O.A.B.—Employer	32.19	
Fed. Unempl. Tax	9.66	
State Unempl. Tax	86.91	
Ind. Insur. & Med. Aid	30.89	
City & State Bus. Taxes	11.86	
Depreciation on Equip.—Trucks	270.72	
Depreciation on Furn. Fix.	25.56	
Depreciation on Lease Imp.	88.81	
Total Operating Expenses	$3425.08	$3425.08
		$5644.08 *$5644.08*
Net Loss for April		*$7664.34*

Summary

Loss for January 1948	*$2527.20*
Loss for February 1948	*3617.34*
Loss for March 1948	*6250.34*
Loss for April 1948	*7664.34*
Total Loss	*$20059.22*

[Italicized figures are shown in red.]

Admitted.

(Testimony of Fay J. Hansen.)

Q. (By Mr. Jonson): Now, referring to the Minute Book, will you tell us who are named as the original incorporators of this corporation?

A. Myself, my wife, and Mr. Todd.

Q. Why was the corporation started?

A. We needed additional funds.

Q. Who is "we," by the way?

A. Well, this thing was a partnership preparing to go into a corporation.

Q. Between whom?

A. Paul Shafer and myself.

Q. All right. Now, go ahead.

A. And we needed additional funds. We talked to Mr. Langley and Mr. Todd several times about it and it was upon Mr. Langley's advice that—rather, we talked to Mr. Langley several times about it, who was an attorney, and he recommended that we have this corporation of—which we did, and at that time I was introduced to Thomas Todd and Thomas Todd took care of the corporation.

Q. And what was the property with which the corporation started?

A. They started with the assets of the Vita-Pakt Company.

Q. That is, the Vita-Pakt partnership?

A. Partnership, rather.

Q. And who received credit for those assets?

A. There was to be five hundred and I believe—five hundred and thirty-one shares of stock—this is

(Testimony of Fay J. Hansen.)

to the best of my recollection—531 shares of stock issued to me, of which there was to have been $5,000 of that sold to pay Paul Shafer his immediate demands for his part of the partnership. The balance of the stock was to go to the corporation and the corporation would accept the assets and liabilities of the previous partnership.

Q. Now, at that time the partnership was principally you and Mrs. Hansen?

A. That is right.

Q. You had not at that time sold any stock?

A. That is right.

Q. And thereafter, according to the order, certain stock subscriptions were signed, one of which was by you, and consented to by Mrs. Hansen, wherein you transferred all of the assets of this business to the corporation, or at least you subscribed for stock? A. Yes.

Q. And the initial stock subscription of Mrs. Hansen was one share and Thomas Todd one share?

A. Yes.

The Referee: Was there a conveyance by you of the assets?

The Witness: No.

Q. (By Mr. Jonson): There was no formal bill of sale executed?

A. There were some notes given to Mr. Shafer for his share of the business.

Q. So then the money that was to come to Mr. Shafer was a return of capital contribution from the partnership, is that right?

(Testimony of Fay J. Hansen.)

A. I don't understand you exactly.

The Referee: Was he selling out or was he going on with the company?

The Witness: No, he was selling out. He was the manager of the Washington Co-op in Tacoma and he had enough to keep him busy there, and so on and so forth, and he wanted to get out of it.

Q. (By Mr. Jonson): And you also executed an affidavit, that the value of this property was not in excess of one hundred thousand dollars?

A. I suppose so. My signature is on it there. This paper work was all drawn out by Thomas Todd, and that's it.

Q. What did you consider the value to be at that time? A. Evidently that.

Q. Not in excess of $100,000?

A. That's right.

Q. And further by-laws and these various other matters were executed and I believe we get down to this report and statement as to shares which reveals that there was allotted to you 530 shares?

A. That is right.

Q. As of June 25th, 1948?

A. That's right.

Q. And 260 shares for which $26,000 in cash had been received as of June 25th, 1948?

A. Well, it hadn't been received at that time—wait a minute, wait a minute—what is this?

Q. June 25th.

(Testimony of Fay J. Hansen.)

A. Yes, that's—that's right, yes. I think it is, yes.

Q. So at that time you sold at least 260 shares of stock and received $26,000 for it?

A. That is right, yes.

Q. About which you can make no claim as to being your stock? A. Oh, definitely.

The Referee: Definitely not, you say?

The Witness: Yes.

Q. (By Mr. Jonson): Now, during the time this corporation was in existence, who constituted the Board of Directors?

A. Well, Thomas Todd and myself and Rosemary, my wife. It was like any other corporation has done. It was not done any different than anybody else does it.

And then Dr. Burkhart was appointed when Doctor,—when Thomas Todd resigned, and when that time was I don't know, but Thomas Todd prepared the Minutes on it and I just can't recall the time, and so forth, about it.

Q. Now, during the time you were connected with the corporation, was there ever a formal meeting of the directors?

A. The Board of Directors? No, never.

Q. Who in fact then conducted the business of the corporation? A. I did.

Q. Did you at any time have any stockholders' meetings with respect to your authority or what you had been doing with respect to the corporation?

A. There were stockholders' meetings held right

(Testimony of Fay J. Hansen.)

from the beginning. Never official ones. There were approximately four or five stockholders' meetings held over a period of five or six months and there was never a question brought up by anybody. You people were the first people to bring up anything.

Q. Well, do you recall, if my memory serves me correctly, that when you testified at the creditors' meeting you stated there was never any stockholders' meetings?

A. I said never an official stockholders' meeting.

Q. Well, we will get back to that. With respect to your authority to set up this drawing account, do you recall what you stated about that?

A. No, I can't offhand, no.

Q. What is your position now with respect to the knowledge of the stockholders?

A. To the drawing account?

Q. Yes.

A. Well, I don't think they knew anything about it. It was there in the books. If they wanted to look in the books, it was all posted. The drawing account actually is a carry-over from the Vita-Pakt Company.

Q. But they did not know anything about the drawing account? A. No, I don't believe so.

Q. You had never brought the matter up to them and asked for any authority to set it up?

A. No. Dr. Burkhart had known that I was selling some of my own stock.

Q. He is the only one? A. That is right.

(Testimony of Fay J. Hansen.)

Q. Do you recall when you told him that?

A. No. It was in a telephone conversation. He used to call me about every day. We talked about the business, this and that.

Q. Now, then, with respect to the sale of the stock, do these represent the stock books?

A. Yes.

Q. Can you identify in those stock books just what shares of stock were yours?

A. This stock was set up and sold——

Q. No, just answer my question. Can you identify from there——

A. There is only one share here that—only one share of stock that was ever issued to me.

Q. And all the rest was issued directly as corporation stock to the various stockholders?

A. That's right. And later on, as this stock was sold, this was supposed to have all been straightened out and the stock of mine that was sold would then be issued to me and then re-issued to them.

Q. Straightened out by whom?

A. By myself and the Bookkeeping Department.

Q. And you used the term: "We were supposed to straighten it out." Whom did you mean by that?

A. I made reference to the bookkeeper, the bookkeeper and I. We had made out the certificates, as she was also the Secretary and general office girl, and she had done the typing.

Q. There was no definite understanding with the stockholders that that was to be done? A. No.

Q. They wouldn't know about that part of it be-

(Testimony of Fay J. Hansen.)

cause you had never told them that you were ever making this drawing account? A. No.

Q. Nor did you ever tell them that you were ever selling your own stock?

A No, and I never told them which stock was sold, either. They were buying Vita-Pakt stock and they had no interest in what stock they were buying as long as it was stock certificate.

Q. By whose interpretation was that?

A. That is my interpretation.

A. That's right. The question was never brought up—never—by anybody.

Q. Well, why should they bring it up? They thought they were buying corporation stock?

A. Then they had to take it for granted. They were buying stock, Vita-Pakt stock. They didn't care whether it was corporation stock or "Joe Blow's" stock.

Q. They never told you that? A. No.

Q. Now, what was the condition of the business from the time you commenced business as a corporation which would have been after February 5th, 1948?

A. Well, the condition of the business was always—it lacked funds, as far as our part is concerned.

Q. Did you make any profits?

A. None. We never made a profit. I have never seen any business yet in six months that could make a profit.

(Testimony of Fay J. Hansen.)

Q. How long had you been in a partnership with Mr. Shafer?

A. Well, that goes clear back to the start of this thing.

Q. Let me ask you this, then: How long was this business in existence prior to being a corporation?

A. Well, it was Mr. Van Liew's business for a while.

Q. So then the business had been in existence longer than six months?

A. Not as a corporation.

Q. Not as a corporation?

A. Not even as a partnership.

Q. But as this type of a business it had been?

A. No, no, not the way we were doing. We were flying up the juice from California. It was entirely different,—altogether different. There was nothing similar to it,—no more than night and day.

Q. Except that you were selling orange juice?

A. Yes.

Q. And to the same kind of people?

A. That's right.

Q. Well, this file, which I believe you will recognize as being part of the records of your company, discloses a certain—certain profit and loss statements? A. That's right.

Q. For instance, showing a net loss in April of $7,664.34? A. Yes.

Q. These were prepared by whom?

A. I believe those came from—I believe these

(Testimony of Fay J. Hansen.)

came from Jack Rundell. Maybe Eve did these if they are April. But the first ones were prepared shortly after Eve came. We didn't use Jack any more as a bookkeeper because we had hired Eve for that purpose.

Q. And about when did Eve start to work for you? A. It was about in December of '47.

Q. And this statement shows a combined loss from January through April of $20,000?

A. Yes.

Q. So you were consistently operating at a loss?

A. That's right.

* * *

Q. (By Mr. Johnson): Handing you what has been marked as Receiver's Exhibit 8, was that statement ever exhibited to any stockholders?

A. I believe this was, yes.

Q. And that shows a daily net profit of $56.43?

A. That is right.

Q. And that is dated July 7th, 1948?

A. Yes.

Q. And what was the purpose of exhibiting that statement?

A. More to make the stockholders happy than anything else, I guess.

Q. It was a misrepresentation then?

A. Yes, that was a misrepresentation—absolutely.

Mr. Walsh: He testified that he prepared it.

(Testimony of Fay J. Hansen.)

The Witness: Eve prepared it, or I prepared it.

Mr. Walsh: I have no objection to it. Is that a carbon or an original?

Mr. Jonson: He has identified that. I will offer it.

The Referee: Any objection?

Mr. Walsh: If there is an original, I would rather have the original.

Mr. Jonson: Well, I asked him: "Was this exhibited to the stockholders?" and he said, "Yes."

Mr Wiley: I object on the ground that it isn't material to this at all. The stockholders had nothing to do with that. The question of whether or not there is some false representation that was made to the stockholders has nothing to do with it at this time.

The Referee: I haven't read all these pleadings but my understanding, from what I have read, and from what was said the other day, is that you and the trustee contend that the transfer made in Mr. Carney's office was void because of duress.

Mr. Wiley: One reason, Your Honor.

The Referee: One reason. And that Mr. Jonson contends now that statements made to him which had foundation in fact can be shown because of misrepresentation, is that your position, Mr. Jonson?

Mr. Jonson: Yes, sir.

The Referee: And if that is his position, and this statement was given to the stockholders—he doesn't say which stockholders—and there was no

(Testimony of Fay J. Hansen.)

objection to the form of the question, so the exhibit will be admitted.

(Document heretofore marked Receiver's Exhibit 8 for identification was received in evidence.)

* * *

Vita-Pakt Associates, Inc.
2710-2nd Ave. - Seattle 1, Wash.
Phone ELliott 6044

Distributors of
Vita-Pakt Brand Fresh Orange Juice

July 7, 1948

Cost Analysis

	Qts.	Pts.	½ Pts.
Juice—Cost plus freight	.1850	.0925	.0463
Bottles—Cost plus freight	.0337	.0228	.0165
Caps—Cost plus freight	.0028	.0028	.0028
Packing Cases—Cost plus freight	.0086	.0045	.0002
	.2301	.1226	.0658

Profit Analyzed—Basis 700 Gallons Daily
700 Qts. — 1400 Pts. — 700 ½ Pts.

	Qts.	Pts.	½ Pts.
Sales Price	.35	.18	.10
Cost	.2301	.1226	.0658
Gross Profit	.1199	.0574	.0342
Daily Output	700	1400	700
Total Daily Gross Profit	$83.93	$80.36	$23.94
		$188.23	
Daily Average Expense		$129.80	
Daily Net Profit		$ 58.43	

Admitted.

(Testimony of Fay J. Hansen.)

Q. (By Mr. Jonson): My question was: When did you start to sell your stock?

A. When we started selling stock? I will grant you there was no record kept here. There is only one share in here and that was transferred to Dr. Burkhart at the start for a dental bill, for work that he had done on my wife, and that was one share, and after that, even on the bonus shares, because there was confusion as to the stamps and stuff, the old certificates were cancelled out and we re-issued them.

Q. Now, right after the corporation started business you also borrowed money from the stockholders? A. That is right.

Q. Have you any idea as to how much?

A. I imagine around ten thousand dollars—maybe a little more or a little less. Right around there some place.

Q. I have a list of the loans attached to my pleadings. This might be unusual. It really isn't in a form to put it in as an exhibit here, but if you would be willing to see if that is correct——

A. I couldn't recall as to the accuracy of this.

Q. Well, do you recall if such loans were made?

A. Yes, there were loans made from Dr. Kiefer and McWhinnie and Jankelson. There were also loans from Cleone Johnson and from Mrs. Penley, and loans made from my mother and loans made from Mrs. Peterson.

Q. What happened to that money?

(Testimony of Fay J. Hansen.)

A. It all went into the corporation.

Q. So that the proceeds from the sale of the stock and the proceeds from the loans were all mixed in with the proceeds from the sales?

A. That's right.

Q. You were going to straighten out the issuance of the stock later. Why didn't you wait to withdraw your money until that was done?

A. Because the money from my own stock went into the corporation at that time—I didn't need the money—when it was sold. So it all went in together and when I did need it, and as I needed it, I took it out.

Q. Well, let me ask you this: After our discussion of this now, do you recall whether Mr. Carney reminded you of some of these things that I have been talking about at this conversation in his office?

A. Not that I can recall. His principal interest was the threat of arrest on the selling of the stock. That was the most important thing.

Q. Well, he did mention other things then?

A. Yes. He mentioned that—this drawing account, as I said before, and I did explain it.

* * *

A. I admitted I misrepresented the stock to the stockholders long before Mr. Carney came into the picture,—not long before, but before he did. The Saturday morning that Mr Carney came in to the picture, prior to that it was Dr. Keefer, Dr. Dougherty, Dr. Burkhart and myself, and I can't

(Testimony of Fay J. Hansen.)

think of the fellow's name,—he is a test pilot at Boeing's—and there was supposedly to have been a couple of other doctors, and they couldn't attend—and I told them that there had been misrepresentation in the amount of orange juice and the amount of profit we were making.

Q. And that had been a continuous one on your part? A. No.

Q. When this had been done, how frequently was it?

A. Well, I couldn't say exactly on that. Towards the last—just before—towards the last of the corporation, mostly—prior to that most of it was potential we were talking about, this and that. A lot of it was facts and a lot of it——

Q. In other words, if you could get some more money, that this was what you could do with it?

A. Yes, a lot of times. Some of this money that was borrowed was borrowed for the purpose of getting fruit and so forth to continue the operation.

Q. Were the loans from Dr. Starksen and Dr. Kiefer obtained for that particular purpose?

A. For——?

Q. For use in the corporaiton's business?

* * *

Q. Now, just one other thing. What property did you turn over to the corporation for this stock?

A. We turned over just the assets of the company.

Q. Of what did that consist?

A. I can't recall offhand. There was a Dodge truck and bottles and our equity in, like refrigera-

(Testimony of Fay J. Hansen.)

tion and stuff that was obtained before, the lease on the building and so forth.

Q. What do you consider it was worth at that time?

A. Well, I think we gave it an approximate worth of around $100,000.

* * *

A. That's prior to incorporation.

Q. Yes, December 17, 1947?

A. That is right.

Q. And you incorporated about two months thereafter? A. Yes.

Q. What kind of a profit did you make in 1947?

A. None.

Q. How much was your loss?

A. I couldn't say offhand.

Q. About $15,000?

A. You people have the books. I don't know.

Q. Do you know whether $15,000 might be correct? A. No, I don't.

Q. But you figure, if I understood you correctly, that the property was worth around $100,000?

A. Well, that would be roughly what we figured on.

* * *

Q. At the time you transferred it on July 29th, 1948, when you signed the bill of sales, the deeds, signed the real estate contract, did you receive anything for doing so? A. No.

Q. Had you previous to that time received anything from the corporation or its stockholders that

(Testimony of Fay J. Hansen.)

inclined you to think you were paying an obligation by transferring the property? A. No.

Q. Or did they promise you any future consideration for transferring those assets?

A. It wasn't definitely promised, but it was put over to me in this manner, these people who feel kinder toward me for selling stock without a permit.

Q. Neither you nor your wife received anything in exchange for the transfer of those items?

A. No.

Q. (By Mr. Jonson): Other than this drawing account, you drew a salary consistently from the business?

A. That is right—not consistently. Just since about the first of the year I started drawing a salary.

Q. Since the incorporation?

A. Yes, that is right.

Q. Of approximately $400 a month?

A. $400 a month.

Q. And those funds were received separate and apart from the drawing account funds?

A. That's right, yes.

Redirect Examination

By Mr. Wiley:

Q. During this period from about January to July, did you also receive money from your relatives on loans? A. That's right, yes.

Q. How much did you receive?

(Testimony of Fay J. Hansen.)

A. I received around $5,000 from my mother and my uncle that went into our house and furniture.

Q. What was done with all the proceeds from the sale of stock?

A. It all went into Vita-Pakt's bank account. Most of the checks were made out to Vita-Pakt Corporation. There were a few made out to me, but I signed them over to the corporation.

Q. Now, I think you testified that the stockholders didn't know anything about this drawing account. As a matter of fact, you and your wife were the big stockholders?

A. That is right. We controlled the stock.

Q. But the other stockholders didn't know anything about it? A. No.

Q. Did the other stockholders know anything about you putting your money for this stock into the corporation account? A. No.

Q. Now, in the formation of this corporation were the debts of the co-partnership assumed by the corporation? A. That is right.

Q. And included in that was some five thousand that Paul Shafer was to have?

A. No, Paul—there was some stock—Paul Shafer had some notes due at the bank that he had to meet right away, so there was some stock to be sold to pay him. I think it was four thousand dollars that he had to have right away, plus the interest. So we set it up as five thousand dollars worth of stock, to be sold immediately in order to pay him

(Testimony of Fay J. Hansen.)

so he could meet his notes whenever they were due. They were due in three or four months, and the balance of his money would come out of the profits.

Q. And how much was paid to Paul Shafer?

A. It was $4,000, plus interest.

Q. And that was paid out of the proceeds of the sale of stock? A. That's right.

Q. And the stock that he was to be paid out of, was that included in your 530 shares.

A. That is right, that five thousand dollars worth came out of that 530 shares.

* * *

The Referee: And then at one time you decided 260 shares of that stock should—the proceeds of that stock should be corporate money?

The Witness: Prior to that.

The Referee: But the decision was made and it was carried out?

The Witness: That is right.

The Referee: But the 530 shares of stock was allotted to you?

The Witness: That is right.

The Referee: And you considered that your personal stock?

The Witness: That is right.

The Referee: But you sold that stock?

The Witness: Part of it.

The Referee: Part of it. And the checks for that stock were made payable to Vita-Pakt or to you?

The Witness: That is right.

The Referee: And then it was later drawn out

(Testimony of Fay J. Hansen.)

by you and charged to this drawing account?

The Witness: That is right.

* * *

The Referee: Did you tell Mr. Carney that this was property she had bought before her marriage?

The Witness: That is right.

The Referee: What did he say to that?

The Witness: He said it didn't make any difference, that they would take it any way.

The Referee: Did he give you any verbal or written releases or security or anything like that?

The Witness: No.

The Referee: That is all.

Q. (By Mr. Wiley): As a matter of fact, you have been arrested since you filed bankruptcy proceedings? A. That is right.

Q. For the crime of selling stock without a license? A. That is right.

Q. And that case is still under advisement by Judge Evangeline Starr? A. That is right.

Q. Now, as to the assets of the partnership, when you formed this corporation did you advise your attorney as to what all the facts were with reference to the assets?

A. I believe so. I don't believe it was prepared in any other manner. Thomas Todd is an O. K. guy, as far as I know.

Q. And did you follow your attorney's advice in setting up the corporate structure as to how much stock you were to have?

A. That is right. As a matter of fact, Mr. Lang-

(Testimony of Fay J. Hansen.)

ley even gave me heck for not having more control of everything. He said I should have had more control; also, Mr. Thorstensen one of our stockholders said so.

Q. Now, were the stockholders interested in the assets of the corporation or in the possibilities of it, as far as you know?

A. They were interested in potential as far as I know.

* * *

Q. (By Mr. Wiley): Handing you Bankrupt's Exhibit 11 for identification, will you tell us what that is?

A. This is a note that I had penned in or scribbled in or wrote in, or something, that was taken by me to Mr. Todd's office when the corporation was first prepared and later this was kept in another book—it isn't here—a stock record book for information. This is the breakdown as to the way the stock was to be sold and I gave this to Eve, the stenographer, the bookkeeper to keep as a reminder.

Q. Is this your plan of the stock to be issued and so on? A. Yes.

Q. Tell us about it.

A. $18,000 to Fay Hansen. This stock supposed to be sold for cash. There is $5,000 of stock to be sold for cash, for Paul Shafer, and $16,000 cash for the company, or a total of $39,000 to be sold in all. There was $30,000 in stock to be sold to Fay Hansen and a total stock issuance of $49,000.

Q. And what was the rest of the stock to be?

(Testimony of Fay J. Hansen.)

A. Not to be issued at this time, and a total of 100,000 shares in all.

Q. And was this slip to be kept in the stock book at all times?

A. Until maybe three or four weeks before this thing blew up.

Q. Was this information conveyed to any of the stockholders?

A. That is right, at different stockholders' meetings.

Q. Were all the stockholders present?

A. At the first one particularly. There were stockholders that bought stock later that weren't present then.

* * *

Q. (By Mr. Wiley): Mr. Hansen, I think you testified that when you sold some of this stock you told the purchasers that the corporation needed money. A. That is right.

Q. Now, do you have any idea of how many stockholders you told that to?

A. Just a few, as far as that part is concerned.

Q. Well, do you know about how many?

A. It would be less than a third—much less.

Q. Much less than a third that you made that payment to?

A. Maybe 25 per cent or less.

Mr. Wiley: That is all.

Recross-Examination

By Mr. Jonson:

* * *

(Testimony of Fay J. Hansen.)

Q. Now, to get back to who knew about this drawing account. Who were the officers during the time that the corporation was in existence?

A. Well, as I stated before, there was myself, my wife, and Thomas Todd first, and I can't recall—I imagine it will show in there when Dr. Burkhart took over his duties and then when this advisory committee met we had a complete change of stockholders down in Mr. Carney's office.

Q. But during the time that you were connected with the corporation, and working for it, you were the president?

A. And manager of the corporation, that is right.

Q. Mrs. Hansen was Secretary-Treasurer?

A. That is right.

Q. And at first Thomas Todd was an officer and then he resigned and then Dr. Burkhart?

A. That is right.

Q. Dr. Burkhart did not work in the business?

A. No.

Q. He was just a stockholder?

A. That is right. Neither did my wife work in the business.

I would like to correct my previous testimony. She didn't work there when it was a corporation. It was prior to that.

Mr. Jonson: I have no further questions.

Mr. Walsh: I have no questions.

ROSEMARY HANSEN

called as a witness on behalf of the Bankrupt, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wiley:

Q. What is your name?

A. Rosemary Hansen.

Q. You are the wife of Fay J. Hansen who just testified? A. Yes.

Q. Do you recall the occasion when you went to Mr. Carney's office and signed transfers on your home, furniture, and car? A. Yes, I do.

Q. Will you tell the Court how you happened to go up to the office?

A. Well, my husband, Mr. Hansen, came to the house in the morning and said that we would have to go down to Mr. Carney's office about noon. He wanted to get there a little early and sign over all our property because he had been threatened with arrest and he figured that he had to do it or they would put him in jail. And the reason for it was, they told him it was because he hadn't a license to sell stock.

Q. Was Mr. Hansen excited at the time?

A. Well, he was very worried, yes.

Q. Do you think he was in any condition to exercise his will voluntarily?

A. What do you mean?

Q. Do you think he was in any condition to exercise any reasonable care in signing any papers?

(Testimony of Rosemary Hansen.)

Mr. Jonson: I think that is a conclusion, possibly, for the court to draw.

Q. (By Mr. Wiley): Well, what was your condition of mind at the time?

A. Well, naturally I was only looking out for his interests. He felt like if he signed all the property over he wouldn't have to go to jail, which he was worried about.

Q. What was your purpose in signing the instruments?

A. To help him, so that he wouldn't have to.

Q. Do you remember who was present when you signed these things? A. Yes.

Q. Who was?

A. Mr. Carney, Mr. Jonson, Dr. Burkhart, Dr. Dougherty, and me.

Q. Was anything said about it in your presence at that time?

A. Well, there was a lot said. I don't know just what you mean.

Q. Well, was there anything said as to why the papers should be signed? A. No.

Q. Did Mr. Carney ask you if you were willing to sign over everything you had to keep your husband out of jail?

A. No. He just gave us the papers to sign. He didn't ask us if we were willing.

* * *

(Testimony of Rosemary Hansen.)

Cross-Examination

By Mr. Jonson:

Q. Well, about when did you return to Mr. Carney's office with Mr. Hansen? A. When?

Q. Yes.

A. It was about 11:00 o'clock, I imagine, in the morning.

Q. And then how long did you remain at Mr. Carney's office?

A. We were there until about noon and then we went out to eat. We came back in about twenty minutes and were there for practically a half an hour, I would say, in signing the papers—maybe a little longer.

Q. You did not hear anything during that time relating to the reasons for this transfer?

A. No.

* * *

ROSEMARY HANSEN

called as a witness on behalf of the Trustee, and having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Walsh:

Q. Mrs. Hansen, on July 29th, when you signed this deed and transferred the other properties to the corporation, did you receive anything by way of reward for doing that? A. No.

Q. From the stockholders or the corporation?

(Testimony of Rosemary Hansen.)

A. No.

Q. Did you feel that you were under any obligation or that you owed the corporation or the stockholders anything? A. No.

Q. Was there any promise of any future reward made to you for doing so?

A. No. All that was said, Mr. Carney said that the stockholders would feel kinder towards us if we did.

Q. Did you have any intention of making a gift? A. No, no, I should say not.

* * *

ERNEST A. JONSON

Cross-Examination

By Mr. Wiley:

Q. Did you make some kind of report on this matter to the State Department of Securities with reference to Mr. Hansen selling the stock?

Mr. Jonson: I object to that line of questioning. I think it would only have a bearing on the duress and fraud and the only place there is any evidence that is material with respect to fraud is as to what occurred either prior or at the execution of these instruments.

Mr. Wiley: They have denied that they made threats of prosecution. I want to show that they not only made threats but have actually been instrumental in having the prosecution instituted.

The Referee: He may answer.

(Testimony of Ernest A. Jonson.)

A. I called up the State Department. I don't know whether you would call it a report or not.

Q. You did contact them about this matter?

A. I did.

Q. And reported to them the facts in your possession with reference to Hansen's activities?

A. Upon questions from the State Securities Department, I advised them.

Q. Yes. And he was charged with selling stock without a permit, was he not, in Judge Starr's Court? A. I believe he was.

Q. You believe? You were present in court on several occasions, were you not?

A. That is right.

Q. And you participated in advising the Prosecuting Attorney with reference to the matter?

A. At the request of the Prosecuting Attorney's office. I went over to the Prosecuting Attorney's office and answered their questions.

Q. You did participate in the trial in open court; you were there discussing the matter with the Prosecuting Attorney at all times, were you not?

A. I wouldn't say that.

Q. Well, you were there, were you not?

A. I was there, yes.

Q. And you did discuss it with the Prosecuting Attorney's office?

A. I am not sure that I discussed it with them at the time of the trial or not.

Q. How much time did you spend in court during the process of the case?

(Testimony of Ernest A. Jonson.)

A. I was there all the time.

Q. But you don't know whether you discussed it with anybody or not?

A. I am not sure that I discussed it with the Prosecuting—with the Deputy Prosecuting Attorney.

Q. Did you in court discuss it with the representative of the State Department of Securities?

A. Yes.

Q. And did you not pay for the services of a court reporter in that trial, or at least employ a court reporter? I don't know whether you paid him or not. A. Yes.

Mr. Wiley: That is all.

The Referee: For my own information—it is no secret—what was he charged with?

Mr. Wiley: With selling stock without a permit and acting as a broker without a permit.

The Referee: I thought that law applied to where the stock was offered to the public.

Mr. Wiley: It does, Your Honor. That was the question in the case. The Court has not decided it yet.

* * *

Recross-Examination

Q. (By Mr. Walsh): Mr. Jonson, you signed a verification of the Answer to the trustee's petition, an order to show cause in this matter, did you not? You signed the pleading prepared by Brother Carl, is that right? A. I believe so, yes.

(Testimony of Ernest A. Jonson.)

Q. And do you recall that that pleading alleges, on page 2 there it says "For further answer to said petition by way of objection to the jurisdiction." In the first paragraph it says "That on or about the 29th of July, 1947, for a valid consideration, the above-named bankrupt executed an * * * the following described real and personal property." Could you tell me what the valid consideration was?

Mr. Jonson: I think he is asking for a conclusion.

Mr. Walsh: Well, he signed the petition.

Mr. Jonson: Well, that doesn't mean that he knows the legal meaning of all the terms in there.

Mr. Walsh: He says that he read and understands the contents.

Mr. Jonson: He has described the facts, or the facts were described in the petition.

Mr. Walsh: That is a fact. He says that the corporation received a valid consideration. What was the consideration?

The Referee: If you can answer it, all right.

A. Well, as I explained before, when we were talking to Mr. Hansen, it was pointed out to him that he had taken moneys from the corporation, that he had misrepresented to the stockholders and defrauded them out of moneys for the sale of stock and therefore he should do everything in his power to keep the corporation going and return all the property—and return all the property that he had.

Q. When you say that you are speaking of the

(Testimony of Ernest A. Jonson.)

$16,000 that he had withdrawn from the corporation? A. That's right.

Q. And you considered that he owed that to the corporation? A. Yes.

RECEIVER'S EXHIBIT No. 33

Use this Form for
Cashier's Checks,
Foreign Domestic Drafts,
Money Orders

The Bank of California,

National Association

92048
6/30/48

Please issue:

cashier's check
draft on
money order

Number	Payable to	Amount
	H. Taylor.....	4500.00

Rate Vita-Pakt Assoc., Inc.

By: T. C. J.

[Initialed]: D.

The Bank of California
National Association

19-11

Number
92048

Seattle, Washington, JUN 30 1919

Pay to the order of * * *H. TAYLOR* * *

$ 4,500.00

EXACTLY $4500 & 00 CTS

CASHIER'S CHECK

Assistant Manager

Rubber endorsement

NBC

PAY TO THE ORDER OF
ANY BANK, BANKER OR THROUGH
CLEARING HOUSE ASSOCIATION OF SEATTLE

JUL 2 '19 2205

NATIONAL BANK OF COMMERCE
OF SEATTLE WASH.

H. Taylor
Heirs of H. Taylor

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(Testimony of Ernest A. Jonson.)

RECEIVER'S EXHIBIT No. 34

Memorandum Debit

Seattle, Washington, June 30, 1948.

Your Account has today been charged as follows:

Re. Purchase of our Cashiers Check No. 92048.

In Favor of H. Taylor.

Total Charge.....4,500.00

Debit Vita-Pakt Associates, Inc. * *

The Bank of California,

National Association

/s/ EVE JOHNSON,

Authorized.

[Stamped]: Paid 6/30/48.

[Stamped]: M.

[Longhand]: Initial D.

(Testimony of Ernest A. Jonson.)

The Referee: So he has got a special account and a special loan account, and a drawing account?

The Witness: That's correct, sir.

The Referee: And what does it represent, do you know?

The Witness: The special account is monies that Fay Hansen borrowed from other—from outsiders, and for some reason or another deposited in a—or recorded it in a liability account to himself, rather than the person from whom he borrowed the money.

The Referee: Well, did he deposit that money with the company?

The Witness: That money was deposited in the company account, yes.

The Referee: That was his money, wasn't it?

The Witness: I think we would have to go to the people who loaned the money to get what their understanding of the transaction was.

The Referee: Well, it wasn't company money, but it did go into the company account?

A. Well, Cleone Johnson—I mean, there is $4,000.00 represented coming from Cleone Johnson, and I think her understanding was that $4,000.00 was loaned to the company with some—I don't know whether she thinks—I believe she does understand that Fay Hansen was personally liable.

Mr. Wiley: The money did go into the corporation account, though, did it?

(Testimony of Ernest A. Jonson.)

The Witness: That is right.

* * *

The Referee: But he contended he was drawing against the sale of the stock?

The Witness: That is correct.

The Referee: Where are the stock sales?

The Witness: This account marked "Capital Stock Sales."

The Referee: And they were all his sales, weren't they?—or were they?

The Witness: I think the stockholders have a little different understanding.

Mr. Jonson: Well, what does the record show?

The Referee: I don't mean that. Fay Hansen was the only man selling stock, is that right?

The Witness: Yes, sir.

The Referee: Well, then, if the stock sales were offset against his drawing account it would build it up very well, isn't that right?

The Witness: Yes.

The Referee: But those transactions are all recorded here that we have been discussing this morning aren't they?

The Witness: They are, yes.

* * *

Mr. Wiley: Do your books show what was done with this $1229.00? Where did it come from?

The Referee: What is that?

Mr. Wiley: Cleone Johnson on April 13th.

Is there an item like that in the books?

(Testimony of Ernest A. Jonson.)

The Witness: That's right.

Mr. Wiley: Well, why is that charged to Hansen?

The Witness: Because he borrowed the money when he was a partner.

Mr. Wiley: Do you know that of your own knowledge now?

The Witness: I talked to Cleone Johnson.

Mr. Wiley: Does it show in the books there, any indebtedness from Hansen to Cleone Johnson?

The Witness: No; it is shown in his capital account.

Mr. Wiley: The capital account is what he had at the time the corporation was formed, isn't it?

The Witness: That is right.

Mr. Wiley: Then that was turned over to the corporation, was it not?

The Witness: That is right.

Mr. Wiley: In consideration of the stock issued to him?

The Witness: That is right.

Mr. Wiley: And the corporation assumed all of the indebtedness, according to the books of the corporation?

The Witness: According to the books of the corporation, right.

Mr. Wiley: But Cleone Johnson was paid. That was charged to him personally?

The Witness: Well, the books never reflect that the corporation received that thousand dollars, or the partnership.

(Testimony of Ernest A. Jonson.)

Mr. Wiley: You just got through testifying that was what was due to Cleone Johnson by the partnership.

The Witness: I testified from my own opinion. The partnership books do not reflect the receipt from Cleone Johnson, and I don't believe the corporation books reflect the receipt from Cleone Johnson before April 13th.

* * *

Q. Going back farther, you said that Mr. Hansen admitted to you that he had $397.00 to buy an automobile? A. That is right.

Q. At all times he maintained this money that he had drawn from the corporation was his own—belonged to him, did he not?

A. He maintained that the corporation owed him money on the basis of the sale of his own stock.

Q. That this was part of the proceeds of the sale of his own stock? A. Yes.

* * *

Q. You say that you assumed that all of these checks drawn by Mr. Hansen were for his own personal private use?

A. All of the checks charged to his drawing account, yes.

Q. You have no knowledge whether or not the proceeds of any of those checks were spent for corporate purposes or not, do you?

A. I have no knowledge that they were so spent.

(Testimony of Ernest A. Jonson.)

Q. It is further based upon the fact that all of these kiting checks were corporate funds?

A. They were cleared. There was a credit and also a charge as far as Vita-Pakt funds were concerned. They would not affect my figures, here, whatsoever, as far as the final analysis.

Q. Now, it is also based upon the assumption that Mr. Hansen was not entitled to one penny for the sale of stock, is it not?

A. For the sale of his own personal stock?

Q. For the sale of any stock of the corporation.

A. That is right.

* * *

Q. (By Mr. Wiley): "$3,350.00, Mrs. William Penley," do you know what that is for?

A. That is money Mrs. Penley loaned Mr. Hansen in 1947.

Q. While he was in partnership?

A. While he was operating as a partnership.

* * *

Q. This item of Cleone M. Johnson—somebody has written here "Loan for $1,229.00," do you know what that was for?

A. I understand that was monies Cleone Johnson originally loaned Mr. Hansen when he was a partner in the old partnership.

Q. That was paid by the corporation bank account to Cleone Johnson?

A. That is correct.

* * *

FAY J. HANSEN

recalled as a witness, having been previously sworn resumed the stand and testified as follows:

Direct Examination

By Mr. Wiley:

Q. There has been testimony here that you admitted at various times to Mr. Carney and Mr. Jonson that you had used funds of the corporation to buy furniture and your car and the house. State whether or not that is true.

A. I explained to them that the drawing account was used for the purchase of—as stated in previous testimony here—I explained this to them that the stock was my own personal stock that was being sold. I went into details on that with Mr. Jonson even down at the plant prior to this meeting in Mr. Carney's office.

I also at that same time had started—and I told Mr. Jonson—I told him how we had issued the stock, the reason it was issued in that manner. I told him that the stock certificates had not been issued to me and then subsequently reissued.

Q. Why had they not been issued in that manner to you?

A. The exact reason I couldn't say except that it has always been this way—supposedly when all of the stock was sold, all of this stuff was going to go back and be corrected and be brought up to date.

Q. Who said that?

A. Jack Rundell, the bookkeeper—that was the

(Testimony of Fay J. Hansen.)

bookkeeper or auditor that we hired—according to Mr. Jonson, I don't know. But I knew nothing about books and we hired a man and paid good money to have these books set up. If they are not according to Hoyle, I know nothing about it.

Q. Did you ever at any time intend to donate any of your stock to the corporation?

A. No, absolutely not. As a matter of fact, Dr. Keefer testified—several of the stockholders, Dr. Keefer and Dr. Burkhart, both had stated to me that they didn't feel I should give my own stock as bonus stock in order to get the money in faster. They felt the company should stand that expense. But I told them that I was just as eager and anxious to make this company go as anybody else and I really didn't care.

Q. How much bonus stock was given away by yourself?

A. Offhand I couldn't say. I can only guess at it. I think their figures were approximately right.

Q. When you took this $4,500.00 and paid Taylor and your house, whose money did you think that was?

A. I thought that was my own money. That was from purchase of stock.

This thing was set up originally for so much stock to be sold and so much to be issued to me and so much to be held in treasury stock, as I believe some of the men have testified. That is what

(Testimony of Fay J. Hansen.)

we were sticking to. Some of my own stock was sold at the first. But at that time we were going to build a home on that lot we procured but decided not to. A little later on we needed the money for this house and it was withdrawn for that purpose. The company used the money in the meantime without paying any interest for it.

Q. When you filed that allottment of shares that was for 790 shares?

A. That allotment of shares I haven't seen that before. Thomas Todd must have done that. This here would be explainable. The 530 shares of stock issued to me——

Mr. Johnson: I object to any explanation. He filed the thing and verified it was true. Why, now, does he come around and say it is different?

The Witness: I am not saying it is different. I am offering to explain it to you, but if you don't wish it, I won't do so.

Mr. Wiley: You have been explaining things around here for two days. I think the bankrupt is entitled to be understood.

The Referee: What did you want to explain?

The Witness: This thing, here, definitely bears out my statement. There was supposed to have been something like 31,000 of stock unissued as per this little slip of paper, here, that I carried up to Mr. Todd's office.

Q. (By Mr. Wiley): And this stock was not sold?

(Testimony of Fay J. Hansen.)

A. That is right—not sold.

Q. Paul D. Schaffer, this item, $500.00 what was that for?

A. Paul Schaffer had $17,000.00 coming for his share of the corporation—not $18,000.00 or something else, but $17,000.00 which he holds notes for except for $4,000.00 plus interest that has already been paid him.

Q. And he was paid on his $500.00?

A. That is right—as a part of that $4,000.00.

Q. His share was to come out of your 530 shares, is that right?

A. There was 5,000 shares of stock that were supposed to have been sold for Paul Schaffer in order to pay him his first demand notes. The rest of them are dated, oh, a year to two years hence. At that time we figured that the corporation would be going along good enough to meet those demands.

Q. Did any of the stockholders besides yourself and your wife know of that arrangement to pay it out of your stock?

A. Yes. Dr. Keefer did explicitly. As a matter of fact, he was home sick and I explained it to him over the telephone one evening.

Also at the Vita-Pakt plant when Mr. Jonson was present and the committee was there, Dr. Keefer said that Paul Schaffer's stuff was definitely a liability of the corporation at that time.

Q. How much has Paul Schaffer been paid?

A. Approximately $4,000.00 plus interest.

(Testimony of Fay J. Hansen.)

Q. That is included in the checks to you?

A. That is right.

Q. There are a couple of checks here for $200.00, one for Fay J. Hansen $200.00. Do you know what that is for?

A. I couldn't say on some of those. Absolutely not. It has been too far back and too much water has gone under the bridge. From memory I couldn't say.

Q. Would you say it was for your personal use or for the use of the corporation. Do you know?

A. Well, I would hestitate to say.

Mr. Jonson: He has already said he didn't know.

The Witness: I couldn't say on those smaller amounts what they are except for the Petty Cash account.

Q. (By Mr. Wiley): There are several Petty Cash Accounts. What were those for?

A. Every time I wanted to buy a paint brush or something like that, instead of coming to Eve to get some money, I turned in little slips of paper that would show how much money I spent for this and that. When that money she gave me was gone, then I would get some more.

Q. All of the Petty Cash is for corporation expenses? A. I believe so.

Q. Do you know why they are charged to you in this drawing account?

A. No, I wouldn't know.

(Testimony of Fay J. Hansen.)

Q. Who made the entries in this book?

A. Well, Eve did, I imagine.

Q. This item of $4,500.00, that was spent by you upon your house?

A. Absolutely—absolutely.

Q. Now, we come down to the meeting in Mr. Carney's office. You heard Mr. Carney testify that he made no threats of any kind of criminal prosecution to yourself. What are the facts?

A. Mr. Carney did threaten me with criminal prosecution according to my previous testimony, according to the "Blue Sky Laws" of the State of Washington, I wasn't allowed to sell stock.

Q. What did he say about the fact that you had sold stock without a permit?

A. He said I was liable to arrest—"To be thrown in jail," I think the expression was. Of which later on I was arrested and the threat has been followed up by——

Mr. Jonson: Objection. If Your Honor please, the witness should answer the question only.

The Referee: I think he has answered that question.

Q. (By Mr. Wiley): Why did you make these transfers to the Vita-Pakt in Mr. Carney's office?

A. To keep from being arrested and thrown in jail.

Q. Do you consider that you were prevented from exercising your own judgment as to whether or not you should do it? A. Definitely.

(Testimony of Fay J. Hansen.)

Q. Did you feel at the time that you owed Vita-Pakt anything?

A. No. I explained it to Mr. Jonson, and also to Mr. Carney—what the situation was.

Q. Did Mr. Carney ask you to make these transfers in payment of a debt that you owed the corporation? A. No.

Q. What did he tell you would happen if you didn't come back?

A. He told me to go home and get my wife and come back about noon or they would come out and get me—which I did.

Q. Is it not a fact that when you first consulted me about this matter that you told me that you didn't want to take any steps to get back your property if they might file charges against you in criminal court? A. Absolutely.

Mr. Jonson: I object to it. Whatever was said by the men is self-serving and not admissible in Court.

Mr. Wiley: It is the purpose to show, Your Honor, that he was still laboring under the threat that he didn't want anything done if they would then carry out their threat.

The Referee: I am in doubt, I will admit the evidence.

Q. (By Mr. Wiley): You have since that time been charged with misdemeanor?

A. That is right.

Q. What was the crime charged?

(Testimony of Fay J. Hansen.)

Mr. Jonson: That is repetitious. I think we have gone over that.

A. The claim was that I was selling stock without a permit according to the Blue Sky Laws of the State of Washington and also selling stock without a Broker's license.

Q. (By Mr. Wiley): Is that the same crime Mr. Carney had threatened to have you arrested for? A. Right—right.

Q. Did Mr. Carney and Mr. Jonson at that time know that you claimed that the fund that had been charged in this drawing account belonged to you?

A. Absolutely—absolutely. Mr. Jonson, the auditor, I told him that down in the plant and, of course, again in Mr. Carney's office. He was there when it was explained to Mr. Carney.

* * *

Cross-Examination

By Mr. Jonson:

Q. What, Mr. Hansen, is your position presently with respect to the liability for money borrowed from Cleone Johnson, your mother, and Mr. Shafer—those people? Now, specifically you mentioned a minute ago that Mr. Schaffer was to be paid from your stock.

A. I said $5,000.00 worth of that stock was to be paid out of the original $4,000.00 which has been done.

(Testimony of Fay J. Hansen.)

Regardless of what was said there——

Q. You have changed your mind now, is that right?

A. No, you can read it back. It is in there.

Q. So, at least $5,000.00 of it would be your personal liability—come from your stock, is that right?

A. The $4,000.00 plus interest that was paid Paul Shafer came from my personal stock.

Q. That was your personal liability to Paul Shafer?

A. I believe it would be considered that. No, it was a corporation deal.

Q. Why didn't it come from your stock, then—why did it come from the sale of stock of the corporation?

A. I don't know exactly why that was done because at Mr. Todd's office, of which a slip or note I worked from was introduced here in evidence, was exactly the status of the situation.

Q. Which showed $35,000.00 worth of stock to you, and $18,000.00 worth of stock to Mr. Shafer, a total of $53,000.00 worth of stock?

A. No, it didn't at all. Drag it out! (Document handed to the witness.) This is the amount of stock to be sold. It says right here, "$18,000.00 to be sold." And it has got my initials, "F.J.H." $5,000.00 to F.J.H., and this is to go to Paul Shafer. $16,000.00 to be sold for cash—that would be the corporation's stock. There was supposed to have

(Testimony of Fay J. Hansen.)
been $30,000.00 issued to Fay Hansen, or a total of $69,000.00 to be issued.

* * *

Q. So, then, we have got a total of $5,500.00 that went into your house?

A. Yes, that is right. I previously admitted a certified cashier's check—yes.

* * *

Q. I am talking about money, now, we got from the people who put it in for stock. A. Yes.

Q. And you started to pay that out to Shafer, advance to Fay $200.00 January 22nd?

A. Yes.

Q. So if you say that you are selling your own stock, when did you start to sell it?

A. Right at the first evidently.

Q. Right at the first? A. Yes.

Q. Was that your idea, then, or what you are figuring out now to make it look better?

A. I believe in my previous testimony fifteen minutes ago, when I went on the stand, I said I started to sell the stock immediately. It made no difference. All of the money went into the corporation.

Q. All of the money went into the corporation?

A. Yes.

Q. And it was mingled up with the proceeds from the sale of orange juice and monies you borrowed?

(Testimony of Fay J. Hansen.)

A. Banks don't keep everything separate.

Q. I understand. But you didn't have any separate account?

A. That is right. The company needed the money and they used it.

Q. So when you withdrew money, you didn't know but what you might be withdrawing money that had come in from an account receivable, or may have come in on a loan?

A. It was my own money. I felt I could withdraw anything as far as that part was concerned, as long as it was done with discretion.

* * *

Q. (By Mr. Jonson): What is your position at this time with respect to the money that was borrowed from Cleone Johnson?

A. It has been the same as it ever was. She got some money and some stock back for her money that was loaned to the partnership. I don't remember the amount but I think—I think this—it could be as wrong as could be but I think it—it was around $4,000.00 that she loaned to the partnership. She took part of that in stock that went to her, her brother, and Nellie somebody, and her mother and herself, and part of it in cash.

Q. That was, then, at all times, an obligation of the corporation after its formation?

A. It was an obligation of the partnership prior to the corporation.

Q. You borrowed the money?

(Testimony of Fay J. Hansen.)

A. For the partnership.

Q. Who was your partner at the time?

A. Paul Shafer .

Q. What was that money used for?

A. Oh, I don't know. It went into the partnership funds some place. I wouldn't know.

* * *

Q. How much stock do you consider you have sold of yours on June 30th?

A. I wouldn't know.

* * *

A. I wouldn't know how many shares of stock I was sold. I was told by Eve Johnson that I was digging into my stock. She had this little memorandum clipped to her stock book. I told her when we got to those points to let me know. We got to that point long before I ever thought we would. She told me about it and I made a remark to her I didn't care whether I sold my own stock or not, just so this company would go.

* * *

Q. (By Mr. Jonson): I would like to know how much of your stock was sold?

A. I want to know, first, how much stock was sold altogether?

Q. 615 shares were issued.

(Short recess.)

A. There was a total of 790 shares that was to

(Testimony of Fay J. Hansen.)

be sold, and issued in all, of which 530 shares was mine to do with as I saw fit, as my own personal property.

There was 260 shares of corporation stock sold. So far, according to the records, there was 561 shares of stock sold and issued. So by subtraction of 260 from 561 that would give you 355 shares of my own stock that was sold for cash.

Q. What figure are you subtracting from 561?

A. From 615.

Q. Oh, from 615?

A. A total of 790 shares of stock issued in all. That was supposed. Of which 530 shares was mine.

There were 250 shares of corporation stock sold. According to the facts and figures that are here, there is a total amount of 615 shares of stock sold and issued—of all of the stock, regardless of whose they were.

Subtracting 260 corporation stock from 615 gives 355 shares of my stock which was sold for cash.

Q. When do you consider that they were so sold?

A. I previously testified I don't know. They were sold right along with the rest of it. Checks came in, in my name or Vita-Pakt's name, and were all deposited in one bank account.

Q. You said 355 shares were sold for cash?

A. 355 shares of my own stock was sold for cash, that is right, of which the money is in the corporation, and of which I drew out part of it. The balance of it is still owed to me, if you want to look at it that way.

(Testimony of Fay J. Hansen.)

Q. So there was still 180 shares not sold?

A. No, that isn't the way it goes at all in my book.

Q. It would be the difference between?

A. Between 780 and 1000 shares.

Q. No, originally 355 shares of yours were sold?

A. Yes.

Q. Then you had 530 shares?

A. That is right.

Q. And the difference?

A. Well, you mean the difference between those two would be what was left of mine that was transferred at Mr. Carney's office?

Q. That was still not sold?

A. That is right.

Q. That would make about 175 shares not sold?

A. Yes, something like that.

Q. Then who gave the bonus stock away—the corporation?

A. It is all in here. According to your facts and figures 615 shares of stock were issued and that would include the bonus shares.

Q. I want to know how much of your stock was sold for cash?

A. I wouldn't know. That 355 would include some of the bonus shares.

Q. Did it include all of them?

A. If they all came from my shares.

Q. Do they?

(Testimony of Fay J. Hansen.)

A. You can subtract 80 from it and there is still plenty left.

Q. I understand that.

A. I think the 80 is included in the 615. It wouldn't make any difference anyway. That is all right.

Q. Yes, it does. Who is making the donation of shares—the corporation or you?

A. I believe in my previous testimony I stated that I offered the bonus shares and gave them of my own free will.

Q. So, then, included in the 355 is 80. So, then, it is fair to say that 275 were sold for cash and 80 were donated as bonus?

A. You could say that, yes.

Q. No. I want to know—is that the way you figure it?

A. I would say roughly that is the way I would figure it.

Q. Well, that is the way you are figuring it?

A. Yes. Of which it was explained at Mr. Carney's office and explained to Mr. Jonson that that was my stock. That is why the drawing account was there—before this blew up, and at Mr. Carney's office. And it didn't make any difference to anybody.

Q. So that you then would have had a right to $27,500.00 worth of cash?

A. I believe so, yes. I never expected to get it unless the corporation was going over in a big way.

* * *

(Testimony of Fay J. Hansen.)

Q. How many shares did you consider that you owned on June 30th, or about that time?

A. That I owned?

Q. Yes—or on June 11th?

A. I don't know. I wouldn't know.

Q. What was the basis, then, of your representation to the Savings & Loan Association that you had a net worth of $70,000.00 on June 11th?

A. Regardless of what it was, it was in the corporation's stock and that is what I figured the value of that stock was.

Q. That is what you figured the value of stock was?

A. That is right, and I explained it to the man at that time.

Q. How did you arrive at the figure of $70,000.00; why couldn't it have been $80,000.00?

A. That is the value I put on it. It could have been $80,000.00. That is the value I placed on it as I stated in my previous testimony.

Q. Is that considering the value of the stock which had not been sold?

A. The stock that had been sold and the money the corporation owed me.

Q. Was there any value on the stock that had not been sold?

A. I thought the company was worth a lot more than you people did.

Q. As of June, you showed an operating loss of $35,000.00?

A. That doesn't make any difference.

(Testimony of Fay J. Hansen.)

Q. Did that affect your valuation of the shares?

A. No.

Q. Tell me, then, included in that $70,000.00 how did you arrive at it? You said money the corporation had, money that you had drawn out and remaining stock. Now, what are the figures that you used?

A. I used the figures that are in the minutes of the corporation—in the original setup of the corporation.

Q. Well, the original worth of your stock in the corporation was $53,000.00? A. Yes.

Q. Meanwhile, by June 11th I assume you had sold some stock? A. That is right.

Q. And you had spent some of that money?

A. Yes.

Q. So, then, where was your $70,000.00?

A. I already made the statement that I considered the valuation at that and that is what was given to the man. He asked me to give my approximate valuation and you know, yourself, as far as that part is concerned, it was a mere matter of formality on that loan deal, there.

Q. I am not interested in that. You claimed you sold your stock. Yet on June 11th you said your net worth was $70,000.00. At that time you must have had some basis for it?

A. Certainly.

Q. How much money was in Vita-Pakt?

A. I don't know how much money was in there

(Testimony of Fay J. Hansen.)

at that time, but I do know that most of it was mine.

Q. Suppose the bank account showed nothing?

A. Well, if it wasn't there—it was there maybe in assets or something else.

Q. Did the assets of Vita-Pakt ever total $70,000.00?

A. No, they didn't. There was a potential there. The rest of these guys bought stock. I could see it. Just because the rest of you people couldn't see it, doesn't mean it wasn't there. I could see it. It was my own estimate of value I put on it—just exactly what the man said.

Q. Did that include an interest in a house?

A. No. I hadn't bought the house, yet, at that time.

Q. I think you had paid $1,000.00 by that time?

A. Just earnest money—yes, that is right.

Q. It didn't include anything except just the stock—your interest in the stock?

A. No, it included the money that Vita-Pakt owed me—money that was in Vita-Pakt.

Q. We started out with a total of $53,000.00 that Vita-Pakt could possibly owe you. You had sold some shares and spent some of the money. The drawing account shows that you had spent some of the money? A. That is right.

Q. How did you figure it out, then—it was worth how much?

A. I have testified two or three times as to the value of it.

* * *

EVE JOHNSON

called as a witness by and on behalf of the bankrupt, having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Wiley:

Q. Did Mr. Hansen ever talk to you about the question of the ownership of the stock that was being sold?

A. When he told me to take care of this paper, he told me that this was the basis on which we would be issuing the stock. When we got up—when we approached $39,000.00 worth, I was to call it to his attention. Then we also discussed that for turning over the partnerhip assets he was getting approximately 530 shares.

Q. Did you ever discuss with him about the stock that was then being sold—whose stock it was?

A. Well, not very fully.

Q. What was said by you or by him?

A. Well, when we approached the $39,000.00 he said we would just discontinue selling the stock, and when it was all sold we would straighten out his portion of it which was approximately 530 shares but we wouldn't straighten out his portion of it until we were further along.

* * *

Q. Here is another one to Paul Shafer $1,000.00, check number 591.

(Testimony of Eve Johnson.)

A. "On account for partnership interest, charge Fay Hansen."

Q. Where did you get the information to put on these checks? A. From Mr. Hansen.

Q. Here is another one to Paul Shafer for $1,100.00. That is "On account of"——

A. "On account for interest in partnership, charge Fay Hansen."

Q. Here is one to Paul Shafer, charged $2,-521.00.

A. "Charge Fay Hansen account in full, Paul Shafer partnership account."

* * *

Q. Then all of those entries were made in accordance with your instructions? A. Yes, sir.

Q. That is from him? A. Yes.

* * *

Cross-Examination

By Mr. Jonson:

Q. Had you been instructed at any time to separate any of the shares of Mr. Hansen's?

A. No.

Q. Or prepare any certificates for him?

A. No. Except that when the stock was all sold we would straighten out his shares of the stock. We discussed that a number of times. He was to help me straighten that part of it out.

* * *

ROSEMARY A. HANSEN

recalled as a witness on behalf of the bankrupt, having been previously sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Wiley:

Q. Did you hear the testimony of Mr. Carney and Mr. Johnson relative to what happened when you were in their office and signed these papers?

A. Yes.

Q. Do you recall anything being said in your presence about signing over the car? A. Yes.

Q. What was said and by whom?

Mr. Jonson: I think this has been gone into before.

The Referee: Probably, but go ahead.

Mr. Wiley: Go ahead.

A. They asked Dr. Doherty if he thought that he would have to sign over the car, too. He figured that it belonged to him,—most of it, at least. So Dr. Doherty said that he thought that the stockholders would feel kind of hard if he didn't, and they agreed with him that they would.

Q. Were you more or less excited at the time?

A. I wasn't too excited. I was more resigned to the fact that it was something that had to be done.

Q. When were you first requested to sign over everything,—who requested it in the first place?

A. Do you mean in the office?

Q. No. Where did you first learn that you were supposed to sign over——

(Testimony of Rosemary A. Hansen.)

A. When Fay came home and told me.

Q. What did he tell you?

A. That he had been requested by Mr. Carney to come out and get me, and all our papers on our property, and bring them down to his office immediately under threat of arrest. He was very excited with that.

Q. What was your purpose in signing those papers?

A. Naturally, for the purpose of protecting him so he wouldn't have to go to jail. That was his one——

Q. Was that your only purpose in signing them?

A. That was the only purpose. I certainly wouldn't, under any other conditions, turn over anything to anybody.

Q. Did you feel because of the statements that Mr. Hansen made that you had no right to exercise your own judgment in the matter?

A. That is right.

Mr. Johnson: That is an improper question.

The Witness: That is the way I felt.

Mr. Wiley: This is the pith of the whole thing, Your Honor,—as to whether she felt she had a right to exercise her own free will in the matter.

The Referee: I think so, particularly in view of the fact that there was separate property involved.

Mr. Wiley: I think you have already answered, have you?

The Witness: I answered "Yes."

* * *

(Testimony of Rosemary A. Hansen.)

Q. And you were at the office frequently enough to sign those certificates? A. Yes.

Q. Did you know at the time you were signing them whose stock was being issued?

A. Whose stock was being issued?

Q. Yes.

A. Surely,—some of the time.

Q. What did you know about whose stock it was?

A. Do you mean whether it was the corporation's or Fay Hansen's?

Q. Yes.

A. Oh, no—no, I didn't know that. I thought you meant who was it issued to.

Q. No. By "whose stock" I meant whose stock was being sold. A. No.

* * *

FAY J. HANSEN

Redirect Examination
(Resumed)

By Mr. Wiley:

Q. In addition to the money you received from the sale of the stock and from your salary from Vita-Pakt Associates, did you receive other monies from them,—from the loans?

A. No, not from the loans.

Q. Didn't you borrow money from your uncle?

A. To go on the house, yes.

Q. How much did you borrow from your uncle?

A. I got $3,000.00 there.

(Testimony of Fay J. Hansen.)

Q. And you borrowed money from your mother?

A. That is right.

Q. How much?

A. I think $2,000.00.

Mr. Walsh: No questions.

* * *

The Referee: Mr. Wiley, maybe I had better ask you. How do you arrive at the figure of $6500.00 being withdrawn? It says, "There was withdrawn with other funds a small portion belonging to him or to wit, the approximate sum of $6500.00 as shown by the books of the corporation, now in possession of Mr. Johnson."

Mr. Wiley: Referring to this drawing account, Your Honor.

The Referee: That is what I want your advice on. There is no breakdown in that, is there?

Mr. Wiley: No. There were some of these things that I understood were corporation debts.

The Referee: This reply was filed, I think, the day we started the hearing.

Mr. Wiley: Yes.

The Referee: There is no breakdown in that, there is no breakdown in the papers attached to the complaint and no breakdown in the books, themselves.

Mr. Wiley: For instance, this $500.00, Paul Shafer,—there was testimony that that was in payment of what he had coming out of this stock. I didn't know at that time whether it would be con-

(Testimony of Fay J. Hansen.)

sidered a personal debt or a corporation debt. The corporation assumes all of the debts and liabilities of the partnership. I understand from counsel that Paul Shafer has filed a claim against the corporation claiming he has $17,000.00 coming from the corporation. The way that was arrived at, we went through here and tried to pick out the things that Mr. Hansen conceded were his personally.

If we eliminate Paul Shafer's $5,000.00 and Mrs. Penley's $4,000.00, I think, and Cleone Johnson's $1,300.00. She was afterwards repaid some of that.

The Referee: It was that $26,000.00 from the sale of stock that was kept with the corporation and not drawn out by Hansen. Do you concede that, Mr. Jonson?

Mr. Jonson: I didn't get your question, sir.

The Referee: I think this account should be reconciled some way. I don't like the way the case is being tried on these accounts.

In the first place, the pleadings and the file were late. I would like to know whether you concede that $26,000.00 from the sale of the stock was retained by the corporation?

Mr. Jonson: From the books that is it certainly. I don't know what you mean by "retained."

Our position is that $51,900.00 was received by the corporation for the sale of stock and that that is corporation funds and that Hansen subsequently withdrew approximately $16,000.00 which he had no authority to withdraw.

(Testimony of Fay J. Hansen.)

The Referee: But only $16,000.00. Do you claim he only withdrew $16,000.00?

Mr. Johnson: From the drawing account figure. That is what our figures are based on.

The Referee: Then, if that is true, there is a great deal more than $26,000.00 left from the sale of stock.

Mr. Jonson: Yes.

The Referee: Well, do you concede that any of this personal property was sold?

Mr. Jonson: No.

Mr. Wiley: Do you concede that some of it was given away?

Mr. Jonson: We don't concede anything as far as that stock is concerned. If he owned any stock, that is for him to prove and I don't see how——

The Referee: Has he proved it?

Mr. Johnson: No, sir.

The Referee: The minutes of the partnership, whereby they sell him all of the assets for 530 shares of stock, does that prove anything?

Mr. Jonson: Only the statement, itself, that that was done.

The Referee: What is your position about it?

Mr. Jonson: Well, first—for instance, as far as the sale of any stock from him,—now he may have been entitled to receive stock from the corporation, but he never took the necessary steps to complete that transaction of issuance of stock to him. The by-laws of this corporation appear to be fairly

(Testimony of Fay J. Hansen.)

standard and provide for the transfer of shares. The procedure therein provided was never complied with.

The Referee: That must be granted.

* * *

In the District Court of the United States for the Western District of Washington, Northern Division.

In Bankruptcy, No. 37835

In the Matter of

FAY J. HANSEN,

Bankrupt.

SUMMARY OF UNREPORTED TESTIMONY ADDUCED ON WEDNESDAY, DEC. 8, 1948

DR. JOHN B. KIEFER

after being duly sworn on oath, testified in substance that:

My name is John B. Kiefer, by occupation a dentist, with offices in the Cobb Building. I first became acquainted with Vita-Pakt Associates, Inc., in January, 1948. I went to a dinner where I met Hansen, and several other dentists were there. The purpose of the meeting was to interest men in putting money into Hansen's business. At that time he did not have the corporation papers completed and was not ready to sell stock. He had some samples of orange juice, and his story was fine. He stressed the possi-

(Testimony of Dr. John B. Kiefer.)
bilities of the business and said he had not done too well in the past, as he was just starting out; he did not tell us how much money he had lost in the past. I first bought $2500.00 worth of stock in January and later $200.00 worth of stock for a share each for my children. After I bought the stock in January, I would go down and watch their operation after work. They were working all hours of the night; and he was always telling us about the long hours he was working and the activity that was going on in the business, and the large orders he was getting and filling. There was a meeting of some of the stockholders at the plant on February 20th. Hansen told us that everything was going along fine and he was making a profit of 100% on the juice. He had some figures typed up showing a cost analysis of the juice, and some other figures. He also gave us the figures on the distribution of the capital stock. (Witness identified Receiver's Exhibit No. 18, which was introduced and received in evidence without objection.) The figures on the Exhibit were the ones that he gave us. There were several meetings of a few of the stockholders that Hansen arranged to try to get more money. He was always giving us figures that the gallonage produced was very high and the profit per gallon very high; that he had large accounts receivable and had to buy large amounts of oranges and containers and was expanding the business and that was why he needed the money. He did not say he was selling his stock

(Testimony of Dr. John B. Kiefer.)

or treasury stock; he was selling stock in the corporation. I took the corporation minute book home on one occasion and saw the statement of shares where Hansen was getting 530 shares; this did not agree with what he had told us at the first meeting—the figures I jotted down on the papers—and I asked him about the discrepancy; and he said that what he had told us was correct and to forget about what was in the books. In connection with the bonus stock, I had suggested at one meeting that he should not give away his own stock as inducement for loans to the corporation, and that the corporation should pay interest. Hansen said he didn't care; that he was trying to help the company out. I didn't know anything about his drawing account and that he was drawing out money other than his salary. That wasn't what he told us. I loaned money to the corporation three or four times. He needed money in a hurry on several occasions for purchase of oranges or cartons. On one occasion he said that he had just had to pay out $15,000.00 for cartons and needed money to buy oranges; that was in June, and I loaned him $3000.00 to buy the oranges. I received a note of the corporation evidencing the loans I made. The loans were evidenced by notes. (Witness identified Receiver's Exhibits 19 and 22, which were introduced and received in evidence.) The note, dated June 30, 1948, was for $3,000.00 loaned at that time. I have the checks that I gave in payment of stock and as loans, and will de-

(Testimony of Dr. John B. Kiefer.)

liver them to Mr. Jonson. The last informal meeting of a number of the stockholders was held at the plant on the evening of July 22, 1948. Hansen called some of us together to get us to buy more stock. He said that things were not going as well as they should and the remaining stock had to be sold in order to keep going. There was some indication that the condition of the business was a little different than what he had previously told us. A number of the fellows bought additional stock at this time. At the meeting, a committee of stockholders was appointed by Hansen to assist him in running the business and a meeting of the committee with Hansen was scheduled for the following Saturday morning at the plant. Before that meeting, some of us finally got suspicious about the entire thing, and I arranged to have an attorney, Mr. Elvin P. Carney, and an accountant, Mr. Ernest A. Jonson, attend the Saturday morning meeting. On that Saturday morning, Hansen finally admitted that he had been misrepresenting the production figures and the profits, but he still didn't give us the true figures that we later discovered. After some discussion of the business on that Saturday morning, Mr. Ernest A. Jonson was requested to examine the books and report to the stockholders the following week. I was not at the meeting in Mr. Carney's office with Mr. Hansen. I did receive several shares of bonus stock for making loans. On the last loans, Hansen needed the money so badly he said that he would pay

(Testimony of Dr. John B. Kiefer.)

$500.00 for a loan; that is why the note is made out for $3,500.00. Hansen insisted on including the additional $500.00 on the note.

My attorney has filed a claim in the receivership against the corporation for money I loaned to rescind the stock sale.

DR. C. M. STARKSEN

after being duly sworn on oath, testified in substance that:

My name is Dr. C. M. Starksen, by occupation a dentist, with offices in the Medical-Dental Building, Seattle. I heard about Vita-Pakt Associates, Inc., from dentist colleagues, and Hansen came to my office and talked about it. He painted a rosy picture about the business. I first put money into it in March and then bought $500.00 worth of stock. I put the first money in more as a speculation than anything else, because of the possibilities of the business. Hansen did say that the company was expanding and needed working capital. He didn't say he was selling his own stock, and he was giving bonus stock in connection with loans and stock purchases. I next bought $1,000.00 worth of stock in April. I loaned $2,000.00 around the end of June. He came to me and said he needed money for the company very badly; that he had just spent about $13,000.00 for cartons and was short of capital, and they also needed oranges to keep going. On that

(Testimony of Dr. C. M. Starksen.)

basis, I loaned him the money. I do not have the promissory note I received evidencing the loan, but do have the canceled checks for payments and loans I made. (Witness identified Receiver's Exhibit No. 21, which was introduced and received in evidence without objection.)

My attorney has filed a claim in the receivership against the corporation for money I loaned, to rescind the stock sale.

DR. L. R. DOUGHERTY

after being first duly sworn on oath, testified in substance that:

My name is Lewis Dougherty, by occupation a dentist, with offices in the Cobb Building. I first heard about Vita-Pakt Associates, Inc., in March. Hansen came into my office and I talked to him a few minutes and told him to come back, which he did. He told me about the money—that he was then producing six to seven hundred gallons of orange juice a day, and he was selling it at a profit of $1.27 per gallon. He brought out a paper showing his wages and expenses, and a profit statement showing that he was making a net profit then of something like three to four hundred dollars a day. I purchased the first stock on the basis of those figures, buying $1,000.00 worth of stock. At the same time, in response to my questions, he said that he was only drawing $100.00 a week out of the company.

(Testimony of Dr. L. R. Dougherty.)

I didn't know anything about the drawing account and that he was taking out money other than his salary of $100.00 a week. There were several informal meetings of a few of the stockholders. I kept after him to have a board of directors appointed and to get information and an accounting out, and he always said he would. At every meeting he always had figures as to the good profits of the company, high production of orange juice and the costs. He always put off having a regular board of directors appointed by saying he was going to do it, and then never doing it. I bought $500.00 worth of stock in the week after July 4; and on the basis of the fine showing the business was making. He accounted for the shortage of working capital by saying that he had large accounts receivable and he was afraid to press the accounts too hard, as he was just building them up; that he was putting in new equipment and machinery and within a few months would have everything paid for if he could sell the stock. Several of us, I believe, and at least I did, suggested that he borrow money from the bank; and he said that Mr. Hitchman at the Bank of California had told him to sell the stock first and that he was trying to get the $37,000.00 worth of stock sold; and then could borrow money from the bank. I never did hear anything about the bonus stock until July; then he was offering a $100.00 share of his own private stock for each $1,000.00 worth of shares purchased. I had asked him when I first

(Testimony of Dr. L. R. Dougherty.)

talked to him how much stock he owned and what he had put into the business. He told me that he had put in about $30,000.00 of his own money; that between him and his wife's family, they owned the control of the company; that his $30,000.00 had gone in by way of assets and profits. The last informal meeting of the stockholders was on Thursday or Friday night, in the latter part of July, and he pleaded with us to buy more stock; he almost admitted that things were not as they should be; and a committee of the stockholders was appointed to meet with him on Saturday morning to try to assist him in running the business. He was supposed to be going to California on the following Monday in connection with corporation business, and someone found out that he had reservations on Sunday. On the prior Thursday night, he had sold more stock, and received the money, and someone got suspicious about him after hearing about the different reservations. As a result, an attorney and an accountant were contacted and requested to attend the meeting of the committee with Hansen on Saturday, July 24, 1948. I was present at the Saturday morning meeting. Hansen then, in answer to questions about the business, admitted that he had been misrepresenting the condition of the business and said that, in fact, he had only been producing about 275 gallons of orange juice a day. He didn't tell us anything about his drawing account, but did say that the company had been losing money right along. As a result of

(Testimony of Dr. L. R. Dougherty.)

this discussion, the accountant, Mr. Jonson, was requested to examine the books and report to the committee as soon as he was through.

I was present a short time at the meeting in Mr. Carney's office on Thursday, July 29th. Mr. and Mrs. Hansen, Mr. Ernest A. Jonson, Mr. Carney and Dr. Burkhart were there. I was not present throughout the entire meeting. While I was present, Fay J. Hansen asked me whether he should transfer the car along with the rest of his property, and I told him that he had taken the money away from other people by misrepresentation and owed it to the men who had trusted him to sign over everything he had. Also, while I was there, Mr. and Mrs. Hansen resigned as officers and directors, and Dr. Kiefer and I were elected in their place. I had not had any prior business experience in investing money or running a business. I would not have bought any stock in the company had I know the true facts.

My attorney has filed a claim in the receivership against the corporation to rescind the stock sale.

DR. GEORGE CHATALAS

after being duly sworn on oath, testified in substance that:

My name is Dr. George Chatalas, by occupation a dentist, with offices in the Stimson Building. I first met Fay J. Hansen through Dr. Burkhart. He

(Testimony of Dr. George Chatalas.)
told me about the business and suggested that I go by and look at the plant and talk to Mr. Hansen. I did this and met Hansen, who showed me around the plant, told me that he had a good business and was making money, but needed more money to expand the business. The next day—this was sometime in March—Mr. Hansen came to my office and brought some orange juice samples. I asked him for more details about the business. He said that the company was then producing and selling 300 gallons of orange juice per day; that that was their present capacity and that he needed more or different machines, and that the company was making a profit; that if the company were only juicing and selling 150 gallons a day, it would be breaking even. He said that he had a lot of money in the company himself. Either on that day, or the next day, I gave him a check for $1300.00 for 13 shares of stock, ten for myself and one each for my children. If the books show that I paid this money on March 18, 1948, that would be correct. After that, I didn't pay a great deal of attention to the business, figuring that it was making a profit and that when the expansion was completed, I might start sharing in the profits.

Some weeks later, I was asked to go to a meeting of some of the stockholders in the Arctic Club. Hansen was there and reviewed the condition of the business and painted a very bright picture, and said that the business was making money. He had some

(Testimony of Dr. George Chatalas.)

papers from which he read figures as to the assets and liabilities and costs and expenses of production, which substantiated the statement, as to the profits and good condition of the business. Some of the stockholders wanted an audit and accounting of the books and asked Hansen to have that done. He said he would be glad to do so, but that the company was new and short of working capital, and that if they called in an accountant that it would cost from $1,000.00 to $2,000.00 to make the audit and that the company could not afford it. After that, no one insisted upon an audit. After this meeting, additional stock had been sold and Hansen called me to tell me that if I bought more stock he would be willing to give me $100.00 worth of stock out of his own private stock, and that this was the arrangement he had made with all of the stockholders.

At that time, he said that he was producing and selling 700 gallons of orange juice a day; that he needed to sell more stock because he had had to buy a substantial amount of cartons for the orange juice.

There was a later meeting at the Washington Athletic Club. Several of the stockholders, probably eight or ten of us, were there. He again painted a very bright picture and read figures from some papers showing where all the money went, how much money was being made, and that there was indebtedness on the new equipment. He said that a Mr. Van Liew, with whom he had started out in the business, wanted to get into the company very badly,

(Testimony of Dr. George Chatalas.)
and that he was going to California to see him. He said he needed more money to keep operating because so much money had been spent on equipment and cartons and he had several carloads of oranges which he needed to pay for immediately. I asked him how it was that he had more stock to sell when he originally said he had only about $6,000.00 or $7,000.00 worth of stock left. He said that some of the prior stock, while it had been spoken for by some of the stockholders, had not been paid for; that he needed the money so badly that the stock would be sold to anyone else who would buy it. One of the stockholders wanted to know where all the profits were going and he said the profits were principally in accounts receivable; that the business was expanding and he was just breaking in on the new accounts and didn't want to go out and press the accounts receivable too hard. He said, for instance, that he had $3,000.00 or $4,000.00 coming from the Alpine Dairy. I then told him that I knew someone down there and would call and see to it that the account was paid, but Hansen asked me not to do so because the relations with Alpine were very good and Alpine was doing such a good job that he didn't want anything to disturb the situation; that the money would come in without any question. At the end of the meeting, some of the fellows bought more stock. The figures that Hansen gave us in that meeting he read from some papers. He said he had prepared financial statements to take to the

(Testimony of Dr. George Chatalas.)

Bank of California in order to get a loan. He had done so, but had been told at the bank to sell the stock first and then the bank would start to loan money.

There was a third meeting of some of the stockholders at the plant sometime around the early part or middle of July. At all the meetings, the principal discussion was by Hansen, and that he needed to sell more stock to keep the company going. At this third meeting, he again reviewed the condition of the business and the picture was very bright, so far as income was concerned. He said that all of the stock had still not been sold and that he was up against it and had to sell additional stock. That he needed the money to purchase oranges. Prior to this meeting, Hansen had come to me and wanted to borrow $1500.00 which he said he needed for the purchase of a carload of oranges. He wanted to borrow money, but I would not loan him any money. More stock was sold at and shortly after the third meeting.

The last meeting which I attended was at the plant on a Thursday night, which was July 22nd. The purpose of the meeting was to raise additional money and he had papers in his hands which he said were financial statements. He read them and the figures showed that the company had been making substantial profits and had substantial assets, but that there was still indebtedness due against the assets. Dr. Dougherty took the statements and called Mr. Hitchman of the Bank of California.

(Testimony of Dr. George Chatalas.)

After this conversation, Dr. Dougherty told us that the bank would advance money to the company because of the fine financial condition, but that the balance of the stock must first be sold. Hansen said that the remaining stock simply had to be sold; that he did not have time to contact new people and that all existing stockholders would have to buy more stock; that he would then be free to go to Los Angeles to close the deal with Mr. Van Liew. At that meeting, and on the basis of the figures that Hansen read to us, I bought an additional $500.00 worth of stock. Several other stockholders also bought additional stock. One of the stockholders suggested, towards the end of the meeting, that while Hansen had obviously been doing a fine job, the business seemed too much for him to manage as well as sell stock; that a committee of the stockholders should be formed to assist Mr. Hansen. This was discussed and Hansen selected his own committee and made a date to meet with them the following Saturday morning, July 25th. I was not on the committee and Hansen called me up later and apologized for not putting me on the committee and that he was doing it right then. I told him I could not serve on it.

After the Thursday night meeting, some of the fellows got suspicious about the entire thing because it developed that Hansen had plane reservations for Los Angeles for the following Sunday morning, which was a different day from what he had told us. As a result, an accountant and an at-

(Testimony of Dr. George Chatalas.)

torney were contacted to attend the Saturday morning meeting of the committee and Mr. Hansen. I went up to the plant where the meeting was to be held at about noon and then discovered that everything was in a mess. I did not receive any bonus stock. I do not have the cancelled checks showing my payment for stock, but will get them and deliver them to Mr. Jonson.

MR. ELVIN P. CARNEY

after being duly sworn on oath, testified in substance that:

My name is Elvin P. Carney; occupation is attorney, with offices in the Hoge Building. I first became acquainted with Vita-Pakt Associates, Inc., in July, 1948. I was called by Dr. Kiefer to attend a meeting at the Vita-Pakt office on Saturday morning, July 25, 1948. When I arrived Hansen and a committee of the stockholders, and Mr. Ernest Jonson were there. I asked a few questions of Hansen and the stockholders. No one seemed to know anything about the books, so we couldn't do much then. Mr. Jonson was requested to examine the books and report to the stockholders' committee and myself. On the following Thursday morning, Mr. Hansen and Mr. Jonson came into my office, Hansen arriving first, at the request of Mr. Jonson. I had a copy of Mr. Jonson's statement and also some statements that Hansen had circulated previously among the stockholders. I talked with Hansen and

(Testimony of Mr. Elvin P. Carney.)
told him that he had withdrawn about $16,000.00 from the corporation without authority. I told him that he had failed to get a permit to sell stock and had committed a gross misdemeanor by selling stock without such a permit. I asked him what property they had, and Hansen told me that they had an equity in their home, an equity in a vacant lot, the household furniture in their home on which they owed considerable money, an equity in an Oldsmobile automobile, and some stock in Vita-Pakt Associates, Inc. I insisted that he turn over to the corporation all property of every kind that he or his wife had. He mentioned that he had borrowed several thousand dollars from his mother, a part of which was used in buying the house and furniture. His justification for withdrawing the money was that he had been selling his own stock and was entitled to all the money—that was what he said. I told him that he had committed a terrible wrong on the stockholders and that he was expected to resign as an officer and director and turn over the property that he had. He (Hansen) brought up the subject of whether or not the stockholders were going to prosecute, and I did say that probably the stockholders would feel more kindly towards him if he turned over the property to the corporation. He agreed to transfer his property to the corporation and I told him that he would have to go and get his wife and bring her back to sign the papers.

The meeting started at about 9:30 or 10:00 o'clock and we talked for about half or three-quar-

(Testimony of Mr. Elvin P. Carney.)

ters of an hour. Hansen then left and was gone for about an hour. He asked if any one of us wanted to go with him and I told him "No." I did not tell him we would come out and get him if he didn't come back. And, as a matter of fact, I didn't really expect him to come back. We didn't use any force of any kind, nor attempt to restrain him.

I called one of the stockholders to arrange to have Dr. Burkhart and several others there in order to elect new directors and officers. Hansen came back with his wife, and I believe Dr. Burkhart was already there by that time. Dr. Dougherty arrived a little later. I told Mrs. Hansen what we expected. Then Mr. and Mrs. Hansen resigned as officers and directors and their successors were elected, as shown by the minute book.

I believe there was some discussion about the car. Hansen didn't want to transfer it, and he asked Dr. Dougherty what the doctor thought of it. Dr. Dougherty told him it should be done, and he agreed. About that time, we had lunch; Dr. Dougherty and Dr. Burkhart left together, and Mr. and Mrs. Hansen, Mr. Jonson and myself had lunch together. Mr. Hansen mentioned that he had only $5.00 left to his name now, so I agreed to buy their lunch. They may have signed some of the papers before going to lunch, but we did return to the office after lunch and completed signing them, or sign all of them. He did call me that night and again bring up the car and didn't want to turn it over, and wanted to raise some money and turn it over instead, but I told him I

(Testimony of Mr. Elvin P. Carney.)
thought it would be better to turn the car over. I never did do anything afterwards to recover possession of the house or car.

The witness identified, and there were introduced and admitted in evidence without objection the following Receiver's Exhibits:

21A Bill of Sale to Automobile.

22A Quitclaim Deed to residence property at 4113 S.W. 109th Street, Seattle.

23 Purchasers Assignment of Real Estate Contract (Lot 1. Block 3, Arroyo Vista).

24 Bill of Sale to appliances and furniture.

RECEIVER'S EXHIBIT No. 21-A

3824603

Bill of Sale

Know All Men By These Presents:

That Fay J. Hansen and Rosemary A. Hansen, his wife, of Seattle, Washington, parties of the first part, for and in consideration of One Dollar ($1.00) and other valuable considerations, do by these presents grant, bargain, sell and deliver unto Vita-Pakt Associates, Inc., the following described personal property now located at 4113 S. W. 109th Street, Seattle, Washington, to wit:

One 1948 8 Cylinder Oldsmobile Club Sedan,

(Testimony of Mr. Elvin P. Carney.)

Model 68, Motor No. 8-138387 H, Manufacturer's Serial No. 68C-6531.

In Witness Whereof, the said parties of the first part have executed this Bill of Sale this 29th day of July, 1948.

/s/ FAY J. HANSEN,

/s/ ROSEMARY A. HANSEN.

State of Washington,
County of King—ss.

I, the undersigned, a notary public in and for the State of Washington, hereby certify that on this 29th day of July, 1948, personally appeared before me Fay J. Hansen and Rosemary A. Hansen, his wife, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal the day and year in this certificate above written.

/s/ ELVIN P. CARNEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed for Record July 29, 1948, 2:30 p.m.

Request of Elvin P. Carney.

ROBERT A. MORRIS,
County Auditor.

Admitted.

(Testimony of Mr. Elvin P. Carney.)

RECEIVER'S EXHIBIT No. 22-A

3824602

Puget Sound Title Insurance Company
Quit Claim Deed for Property Within the
State of Washington

The grantors, Fay J. Hansen and Rosemary A. Hansen, his wife, of the city of Seattle, county of King, state of Washington, for the consideration of One and No/100 ($1.00) dollars in hand paid, convey and quitclaim to Vita-Pakt Associates, Inc., a Washington corporation, the following described real estate, situate in the county of King, state of Washington:

Lot 22, Block 4, Arroyo Vista Addition, according to plat thereof recorded in Volume 41 of Plats, page 45, Records of King County, premises to be known at 4113 S. W. 109th Street.

Dated this 29th day of July, 1948.

/s/ FAY J. HANSEN,
/s/ ROSEMARY A. HANSEN.

(Testimony of Mr. Elvin P. Carney.)
State of Washington,
County of King—ss.

I, the undersigned, a notary public in and for the state of Washington, hereby certify that on this 29th day of July, 1948, personally appeared before me Fay J. Hansen and Rosemary A. Hansen, his wife, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

[Seal] /s/ ELVIN P. CARNEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed for Record July 29, 1948, 2:30 p.m.

Request of Elvin P. Carney.

ROBERT A. MORRIS,
County Auditor.

Admitted.

(Testimony of Mr. Elvin P. Carney.)

RECEIVER'S EXHIBIT No. 23

3824601

Purchaser's Assignment of Real Estate Contract

For Value Received, the undersigned Assignors, holders of that certain real estate contract entered into on the 1st day of July, 1946, between Edward A. Clifford and Josephine Clifford, his wife, and Wm. P. Joslin & Mildred W. Joslin, his wife, as Sellers, and Rosemary A. Griffen, whose husband's name is Fay J. Hansen, as purchaser, for the sale and purchase of the following real estate situated in King County, Washington, to wit:

> Lot 1, Block 3, Arroyo Vista, recorded in Volume 41 of Plats, page 45, records of King County,

do hereby assign, transfer and set over to Vita-Pakt Associates, Inc., the Assignee, the said real estate contract, and said Assignors do convey said described premises to said Assignee.

Dated: This 29th day of July, 1948.

/s/ FAY J. HANSEN,

/s/ ROSEMARY A. HANSEN.

State of Washington,
County of King—ss.

I, the undersigned, a notary public in and for the State of Washington, hereby certify that on this

(Testimony of Mr. Elvin P. Carney.)

29th day of July, 1948, personally appeared before me Fay J. Hansen and Rosemary A. Hansen, his wife, to me known to be the individuals described in and who executed the foregoing instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

Given Under My Hand and Official Seal the day and year in this certificate above written.

ELVIN P. CARNEY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed for Record July 29, 1948, 2:30 p.m.

Request of Elvin P. Carney.

ROBERT A. MORRIS,
County Auditor.

Admitted.

RECEIVER'S EXHIBIT No. 24

3827547

Bill of Sale

Know All Men By These Presents: That Fay J. Hansen and Rosemary A. Hansen, his wife, of Seattle, Washington, parties of the first part, for and in consideration of One Dollar ($1.00) and other valuable considerations, do by these presents

(Testimony of Elvin P. Carney.)

grant, bargain sell and deliver unto Vita-Pakt Associates, Inc., the following described personal property now located at 4113 S. W. 109th Street, Seattle, Washington, to wit:

1 NC8 GE Refrigerator, C # 8D051769
U # 82-095-079

1 CD1 GE Range #2317616 w/ 1 C3-47 Raisable Unit installed

Together with all other household property located at the above address.

In Witness Whereof the said parties of the first part have executed this Bill of Sale this 29th day of July, 1948.

/s/ FAY J. HANSEN,

/s/ ROSEMARY A. HANSEN.

State of Washington,
County of King—ss.

I, the undersigned, a notary public in and for the State of Washington, hereby certify that on this 29th day of July, 1948, personally appeared before me Fay J. Hansen and Rosemary A. Hansen, his wife, to me known to be the individuals described in and who executed the foregoing instrument, and asknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

(Testimony of Elvin P. Carney.)

Given Under My Hand and Official Seal the day and year in this certificate above written.

/s/ ELVIN P. CARNEY,
Notary Public in and for the state of Washington,
Residing at Seattle.

Filed for Record Aug. 9, 1948, 3:45 p.m.

Request of Johnson & Dafoe.

ROBERT A. MORRIS,
County Auditor.

Admitted.

On cross-examination Mr. Carney admitted that he did not ask Mrs. Hansen at the time she signed the documents whether she was executing them of her own free will.

I have filed a claim for attorney fees in the receivership proceedings of Vita-Pakt Associates, Inc., and in that claim I stated that I had insisted that Hansen turn over all his property to the corporation, and I believe that is a fair statement of what I did.

The Referee asked Mr. Carney why these transfers would not constitute a preference, and Mr. Carney said that an individual had the right to prefer creditors, although it might be void in bankruptcy, but at the time he took the conveyances he did not know there was going to be a bankruptcy.

DR. B. JANKELSON

after being duly sworn on oath, testified in substance that:

My name is B. Jankelson, my occupation a dentist, with offices in the Stimson Building, Seattle. That I first became acquainted with Fay J. Hansen during the early part of the corporation's operations. He told me that the business was operating at a profit and was producing from 500 to 700 gallons of orange juice per day; that it cost 70c a gallon to produce the orange juice and it sold for $1.40, and that there was a profit of 70c on each gallon sold. He had figures on the assets and liabilities and profit and expense which showed the business in very fine condition. As it was a new business, I told him I wasn't interested and wanted to see how it got along. I also found out, or Hansen may have told me, that there was a problem in regard to the use of the name "Vita-Pakt Associates." He didn't have any written authority to use the name and Mr. Van Liew apparently had some right to it. He was going to California, however, to straighten that out. That was another reason why I didn't want to have anything to do with the business and wouldn't until he had the full right to use the name.

I attended the meeting of some of the stockholders at the Washington Athletic Club. At that time Hansen needed more money and wanted to sell more stock and said he had $10,000.00 tied up in accounts receivable, a substantial part of it from the Army and Government Hospital, I believe. He

(Testimony of Dr. B. Jankelson.)

said that it always took quite a while before you could get money from the Government and that with his money tide up like that, he was having a hard time. On the other hand, he said he wanted to get more Government business because you were always sure of being paid.

I refused to have anything to do with buying any stock although he kept after me all the time and he always pounded away at the same old thing—that it cost 70c a gallon to produce the orange juice and he was selling it at $1.40 a gallon, and that there was a profit of 70c on each gallon sold and that he was selling 500 to 700 gallons a day. I checked with my bank and was informed that a Dun & Bradstreet report of the business showed that it was in very fine condition and was a profitable operation. He kept after me and although I did not buy any stock, I finally loaned him $2,500.00 on June 10, 1948, for which I received a promissory note of the corporation. I loaned it to him because he said he needed money very badly, just having spent some $15,000.00 for oranges or cartons and he was short of working capital; that at that time the business was making good money and he would pay it back without any trouble. After that time, he used to call me up to get me to exchange the note for stock and said that the stock was being sold and that he wanted me to be sure to have some of it so I could get in on the business and the profits that were being made. He repeated his claims as

(Testimony of Dr. B. Jankelson.)

to the fine condition of the business and how much orange juice was being produced and how much profit was being made. Finally I believe he called me on Saturday, July 24th, and I told him to come up to my office Monday, and we would talk about exchanging my note for stock. His repeated statements that it was costing 70c per gallon to produce the orange juice and he was selling it for $1.40 a gallon and that he was making a profit of 70c a gallon, finally had their effect, and on July 26th, Monday morning, I surrendered my note and he delivered a stock certificate to me for twenty-five shares. Then I gave him the note and we had a full discussion again about his business. He said he was getting more Government business all the time; that he was getting a large volume with the Army; that as soon as they got the equipment paid for, that there wouldn't be any question about the stockholders getting profits, and again repeated his old formula of the juice costing 70c a gallon to produce, which sold for $1.40 a gallon, at a profit of 70c a gallon, and that he was selling 500 to 700 gallons a day. After I got the stock certificate, the next thing I knew was the following Tuesday night at a Dentist's Study Club that I conduct, I believe it was Dr. Edgars saw me, and walked up and said "Hello, Sucker." I then found out that Hansen had admitted on the prior Saturday morning that his representations as to the profit and produc-

(Testimony of Dr. B. Jankelson.)
tion were false and that the company had actually been losing money.

I then filed a claim in the receivership against the corporation to rescind the exchange.

ERNEST A. JONSON

after being duly sworn on oath, testified in substance that:

My name is Ernest A. Jonson, by occupation a certified public accountant, with offices in the Dexter Horton Building; and am the receiver of Vita-Pakt Associates, Inc.

That I first became acquainted with Vita-Pakt Associates, Inc., in July, 1948. Dr. Kiefer called me and asked me to attend a meeting at the Vita-Pakt office on a Saturday morning, July 25, 1948. I arrived there about 11:00 o'clock or so, and Mr. Hansen and some of the stockholders were there. Mr. Carney arrived after I did. There was some discusion about the condition of the business. Nothing could really be done until the books were examined, so the meeting broke up and I was requested to examine the books. I started examining the books the following Monday at the Vita-Pakt office. In connection with examining the books, I talked to Eve Johnson, the bookkeeper, and to Mr. Hansen. I noted the drawing account through which Hansen had withdrawn about $16,000.00 and

(Testimony of Ernest A. Jonson.)

asked him about it. He said that represented proceeds from the sale of his stock, and admitted to my subsequent questions that no certificate of stock had ever been issued to him, and that the stockholders did not know he had been drawing out the money. I also noted that he had been running a "check kite" with the corporation bank account and his personal account, which he admitted, and I did tell him that people had gone to jail for doing just that. When I had asked him about the money he had been withdrawing, he said it had gone to Paul Shafer, his former partner, and for general personal expenses. I asked Hansen specifically about a $4,500.00 payment to H. Taylor and he told me it was none of my business. When I told him that the amount of the loss of the corporation since it started to do business was approximately $35,000.00, he said that was a little higher than he thought—that he thought it had been about $20,000.00 loss.

On the following Wednesday, I reported to Mr. Carney and a committee of the stockholders. Then on Thursday morning, I went to the Vita-Pakt office and told him that Mr. Carney and I wanted to talk to him in Mr. Carney's office. He drove down and arrived before I did. Mr. Carney did most of the talking and had a copy of the statement of the books I had prepared and some other papers Hansen had prepared for the stockholders.

Mr. Carney mentioned the failure of Hansen to

(Testimony of Ernest A. Jonson.)

get a permit to sell securities and that it was a gross misdemeanor. Mr. Hansen said he felt he was entitled to the money he had withdrawn because he had been selling his own stock, and Mr. Carney told him he couldn't come now and claim that in view of his prior representations. Neither Mr. Carney nor I threatened him with prosecution. He was the one that brought up the possibility of prosecution by the stockholders.

Mr. Carney told him that he was to transfer the house, car and furniture to the corporation, which he agreed to do. Mr. Carney told him that the stockholders would feel more kindly towards him if he did so. Hansen was told to go home and get his wife and he (Hansen) asked if one of us wanted to go with him, and he was told no. Neither Mr. Carney nor I told him that we would come and get him if he didn't come back.

He was gone for about an hour and came back with Mrs. Hansen. Dr. Burkhart and Dr. Dougherty also came to Mr. Carney's office. Mr. and Mrs. Hansen resigned as directors and officers and I believe Dr. Kiefer and Dr. Dougherty were elected in their place; the minute book shows what happened. There was some discussion about the car, but Hansen finally agreed to transfer it, too. Mr. Carney started to dictate the papers, and then we went out to lunch, Mr. Carney, Mr. and Mrs. Hansen and myself. After lunch, we returned to the office and Mr. and Mrs. Hansen signed the papers. When it was all

(Testimony of Ernest A. Jonson.)

over, Mr. Hansen said that he felt better about the whole thing.

After that meeting, I was appointed temporary manager of the business, and on August 4th was appointed temporary receiver, and on August 9th was appointed permanent receiver and qualified as such on August 9th. At the time I took over as receiver, the corporation was insolvent; claims have been filed in receivership totaling approximately $40,000.00, and there are not enough assets to pay all claims, only a very small part of them.

I contacted the Department of Licenses to see if Hansen had in fact obtained any kind of permit, or made any kind of a report to the state in connection with obtaining a permit; if he had, I was looking for information as to Hansen's representation of the condition of the business. From there on, the department took over, and a representative of the department signed the complaint against Hansen for selling securities without a permit. I attended the trial of Hansen and testified for the State. I was interested in seeing how far a person could go in selling stock without getting a permit.

(Witness identified Receiver's Exhibit 26, which was introduced and received in evidence without objection. The books indicate that the partnership of Hansen and Shafer commenced business about July 1, 1947, and continued through December 31, 1947. That during that period certain assets, as well as liabilities, were acquired by the partnership and

(Testimony of Ernest A. Jonson.)
the partnership sustained an operating loss of approximately $15,000.00. That as of December 31, 1947, the assets were $24,255.83, and the liabilities were $10,241.70. That included in the assets was an item of $6,000.00 for good will. That the net worth of the partnership as of December 31, 1947, was $14,014.13, which consisted principally of $6,000.00 good will and $3,870.30 in Drawing Account of Fay Hansen. That closing entries were made in the partnership books as of December 31, 1947, and such closing entries were transferred and became the opening entries of the corporation books. That the partnership books do not show Cleone Johnson, Mrs. Herbert Penley or Paul Shafer as creditors of the partnership.

That the corporation books were opened as of January 1, 1948, (corporation books and records identified, introduced and received in evidence without objection as Receiver's Exhibits 27 through 30, being as follows:

Exhibit 27—General and subsidiary ledgers

Exhibit 28—Sales, purchases, cash received and cash disbursement journal

Exhibit 29—Stockholders Ledger

Exhibit 30—Bank deposit slips.)

RECEIVER'S EXHIBIT No. 27

Transferred to Corporation Jan. 1, 1948
From Vita-Pakt Associates
Assets & Liabilities

Date 1948		Charges	Date 1948		Credits
Jan. 1	Bank Acct.	$ 17.73	Jan. 1	Accts. Pay.	$ 1,850.27
	Petty Cash	20.00		Contracts Pay.	6,156.52
	Accts. Rec.	2,186.58		Notes Pay.	1,000.00
	Inventory	1,333.36			
	Lease Improvements	2,950.28		Depr. Lease Improv.	74.60
	Equipment & Trucks	10,236.90		Depr. Equip. & Trucks	559.05
	Furn. & Fix.	1,494.39		Depr. Furn. & Fix.	51.22
	Prepaid Ins.	150.48			
	Prepaid Rent	480.00		Reserve With. Tax	272.60
	Advances to Employees	70.98		Reserve F.O.A.B. Employees	31.46
				Reserve F.O.A.B. Employer	31.38
	Goodwill	6,000.00		Reserve Federal Unempl.	12.65
				Reserve State Unempl.	84.75
				Reserve Business Tax	13.20
				Reserve Ind. Insur.	84.93
				Reserve Accrued Wages	174.00

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

Special Accts.		
Bob Shafer	240.00	
H. Johnson	290.00	
Fay Hansen		
Drawing Acct.	3,870.30	
Capital Acct.	14,245.35	
Paul Shafer		
Capital Acct.	10,916.90	
	$39,959.12	
Loss 1947	15,018.42	
	$39,959.12	

(Testimony of Ernest A. Jonson.)
Receiver's Exhibit No. 27—(Continued)

Notes Payable
(Other Than Bank of California)

Date 1948		Posting Reference	Charges	Date 1948		Posting Reference	Credits
June 28	Repayment Note Due			Apr. 27		C 8	$ 1,880.74
	6/28—Dr. Sykes	CR 16	$1,000.00	Apr. 30		J 7	1,119.26
July 2	Repayment of Note dated				30-day note dated 4/27/48		
	6/24/48—				Dr. John B. Kiefer.....		$ 3,000.00
	Dr. John B. Kiefer.....	CR 17	2,000.00	Apr. 29	60-day note dated 4/29/48		
					Dr. Arthur B.		
July 22	Note Dated 6/23/48—				MacWhinnie	C 8	2,000.00
	John E. Nelson—exchanged						*5,000.00*
	for 10 sh. c stock.....	J 13	1,000.00	June 10	2-day note dated 6/10/48		
					Dr. Jankelson	C 11	2,500.00*
July 23	Pmt. on Acct. of Note due						
	7/23/48—Dr. E. Kohl....	J 14	500.00	June 17	60-day note dated 6/17/48		
			4,500.00		Dr. J. E. Nelson	C 12	1,000.00
July 26	Dr. Jankelson Note exchanged			June 23	21-day note dated 6/23/48		
	for 25 sh. stock cert.				Dr. J. E. Nelson	C 12	1,000.00
	1189	J 14	2,500.00	June 23	5-day note dated 6/23/48		
			7,000.00		Dr. Walter Sykes	C 12	1,000.00*

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

June 24	—day note dated 6/24/48		
	Dr. John Kiefer .....C 12	2,000.00	
June 30	—day note dated 6/30/48		
	Dr. C. M. Starksen ....C 12	2,000.00*	
June 30	Note due 7/9/48		
	Dr. John B. Kiefer ....C 12	3,000.00	
		17,500.00	
	*6/30 $16,500		
July 16	Note due 7/23/48		
	Dr. E. E. Kohl .....C 13	1,000.00	
		†$500 acct.	
		18,500.00	
	*7/31 $11,500		

[Italicized figures shown in pencil. * "No note here" in pencil. † Shown in red.]

(Testimony of Ernest A. Jonson.)
Receiver's Exhibit No. 27—(Continued)

Deficit — 1947

Transferred From Vita-Pakt Associates to New Corporation

Date 1948		Charges	Balance
Jan. 1	Deficit Transferred From Old Company	$15,018.42	*1/31 $15,018.42*

[Italicized figures shown in red.]

Capital Stock Sales

Date 1948		Posting Reference	Credits	Cert. No.	
Jan.	19	King Paget—2 sh. ....C 1	$ 200.00	# 4	
	20	C. Peterson—5 sh. ....C 1	500.00	# 5	
	26	O. H. Anderson—1 sh. ....C 1	100.00	#63	
	26	J. B. Kiefer—26 sh. ....C 1	2,500.00	#13	(1 sh. bonus)
			3,300.00		
Feb.	11	Kenneth B. Edgers—2 sh....C 3	200.00	# 1	
	11	Carl O. Anderson—3 sh. ....C 3	300.00	# 2	
	13	A. B. MacWhinnie—5 sh. ....C 3	500.00	# 3	
	20	Ernest E. Kohl—5 sh. ....C 3	500.00	#10	
	24	Stuart H. Lee—5 sh. ....C 4	500.00	#11	
	13	Douglas D. Kiefer—1 sh. ....C 3	100.00	#14	
	13	John Burton Kiefer—1 sh...C 3	100.00	#15	*2/28 5,500.00*
			5,500.00		
Mar.	2	Herbert J. Schnardt—5 sh...C 5	500.00	#12	
	1	O. H. Anderson—1 sh. ....C 5	100.00	#63	
	2	Carl O. Anderson—2 sh. ....C 5	200.00	#17	
	4	Phyllis E. Burkhart—1 sh...C 5	100.00	#25	
	4	Barbara J. Burkhart, 1 sh...C 5	100.00	#26	
	4	C. M. Starksen—5 sh. ....C 5	500.00	#23	
	4	Ross C. Lindley—10 sh. ....C 5	1,000.00	#22	
		81 sh.	*8,000.00*		
	4	Kenneth B. Edgers—25 sh...C 5	2,300.00	#24	(2 sh. bonus)
	8	Thomas A. Swayze—2 sh....C 5	200.00	#28	
	9	James B. Neilson—5 sh. ....C 5	500.00	#29	

[Italics are penciled in. Certificate Numbers and bonus shares are shown in red.]

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

Capital Stock Sales (Continued)

Date 1948		Posting Reference	Credits	Cert. No.
	11	Ernest E. Kohl—22 sh.....C 5	2,000.00	#27 (2 sh. bonus)
		135 sh.	*13,000.00*	
	15	A. B. MacWhinnie—6 sh. ....C 5	500.00	#30 (1 sh. bonus)
	15	Sebastian A. Archer, 5 sh.....C 5	500.00	#32
	15	James B. Neilson—5 sh. .....C 5	500.00	#31
	15	Grant Seaton—7 sh. .....C 5	700.00	#34
	16	James L. Archer—2 sh. .....C 6	200.00	#33
			15,400.00	
	17	John E. Nelson—10 sh. .....C 6	1,000.00	#38 #45)
	18	John E. Nelson—11 sh. .....C 6	1,000.00	#46) (1 sh. bonus)
	18	Hildegarde Mehus—10 sh...C 6	1,000.00	#43
	18	Geo. J. Chetalas—10 sh. .....C 6	1,000.00	#39
	18	Faye E. Chetalas—1 sh.....C 6	100.00	#40
	18	Joan B. Chetalas—1 sh. .....C 6	100.00	#41
	18	George M. Chetalas—1 sh.....C 6	100.00	#42
	18	Irving Anderson—5 sh. .....C 6	500.00	#44
		209 sh	*20,200.00*	
		209 sh.	*20,200*	
Mar.	18	Helen Thorstenson—5 sh.....C 6	500.00	#37
	18	R'mary Thorstenson—5 sh. C 6	500.00	#36
	18	Odin Thorstenson—5 sh. ....C 6	500.00	#35
		224 sh.	*21,700.00*	
	22	D. D. Beebe—5 sh. .....C 6	500.00	#48
	22	B. B. Beebe—5 sh. .....C 6	500.00	#47
	22	Walter Sykes—20 sh. .....C 6	2,000.00	#50
	22	Lewis Dougherty—10 sh. ....C 6	1,000.00	#49
		264 sh.	*25,700.00*	*3/31 28,200.00*
	25	Ralph E. Williams—25 sh...C 6	2,500.00	#51
		289 sh.	*28,200.00*	
Apr.	22	C. M. Starksen—10 sh. .....C 8	1,000.00	#52
	27	Chas. D. Cummins—1 sh. ....C 8	100.00	#53
	27	Ralph Williams—25 sh. .....C 8	2,500.00	#54
	29	B. B. Beebe—5 sh. .....C 8	500.00	#55 *4/30 32,300*
		330 sh.	*32,300.00*	

[Italics are penciled in. Certificate Numbers and bonus shares are shown in red.]

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

Capital Stock Sales (Continued)

Date 1948		Posting Reference	Credits	Cert. No.	
May	3	Carl O. Anderson—2 sh.....C 8	200.00	#56	
	6	Roy J. Conea—25 sh. .....C 9	2,500.00	#57	
	10	Jas. A. Fraser—10 sh. .....C 9	1,000.00	#58	
	10	B. J. Werner—10 sh. .....C 9	1,000.00	#59	
	17	F. T. Emery—10 sh. .....C 9	1,000.00	#60	
	26	C. M. Starksen—10 sh. .....C 10	800.00	#61	(2 sh. bonus)
	26	O. H. Anderson—2 sh. .....C 10	200.00)	#63	
	26	O. H. Anderson—8 sh. .....J 9	800.00)	#63	(1 sh. bonus)
		408 sh.	*39,800.00*		
June	7	Douglas T. Foster—5 sh.....C 11	500.00	#64	*5/31 39,800*
	23	Dr. W. Sykes—24 sh. .....C 12	2,000.00	#66	(4 sh. bonus)
		437 sh.	*42,300.00*		
July	13	Dr. Irv. Anderson—6 sh.....C 13	500.00	#70	(1 sh. bonus)
	13	Dr. Lewis Dougherty, 5 sh. C 13	500.00	#71	
	22	L. J. Nelson—11 sh. .....C 14	1,000.00	#74	(1 sh. bonus)
		459 sh.			
	22	Dr. J. E. Nelson—10 sh.....J 13	1,000.00	#75	
		469 sh.			
	23	Stuart H. Lee—2 sh. .....C 14	200.00	#87	
	23	Dr. H. J. Schmidt—2 sh.....C 14	200.00	#81	
	23	Dr. Roy Correa—5 sh. .....C 14	500.00	#80	
	23	Hildegarde Mehus, 5 sh.....C 14	500.00	#85	
	23	Dr. G. Chatalas—5 sh. .....C 14	500.00	#78	
	23	K. Pagett—3 sh. .....C 14	300.00	#79	
	23	Dr. L. Dougherty—5 sh. ....C 14	500.00	#77	
	23	Dr. F. T. Emery—5 sh. .....C 14	500.00	#88	
	21	Dr. C. O. Anderson)4 sh.....C 14	300.00		
	23	Dr. C. O. Anderson)	100.00	#86	
		Total.....505 sh.	*48,900.00*		
	23	Dr. Kenneth Edgers, 5 sh...J 14	500.00	#83	
		Total 510 sh.			
	26	Dr. Jankelson 25 sh. in exchange for note 6/10/48..J 14	2,500.00	#89	
		Total.....535 sh.	*51,900.00*		*7/31 51,900*

[Italics are penciled in. Certificate Numbers and bonus shares are shown in red.]

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

Fay J. Hansen—Special Loan Acct.

Date 1948	Posting Reference	Charges	Date 1948	Posting Reference	Credits	Balance
						$
Feb. 18	CR 5	$ 500.00	Feb. 16	C 3	$ 500.00	
24	CR 5	900.00	19	C 3	900.00	
		1,400.00	26	C 4	1,550.00	2/29 *1,550.00*
					2,950.00	
Mar. 1	CR 6	1,550.00				
5	CR 6	1,300.00	Mar. 3	C 5	1,300.00	
11	CR 7	2,000.00	9	C 5	2,000.00	
18	CR 7	6,000.00	16	C 6	6,000.00	
		12,250.00			*12,250.00*	
Apr. 13	CR 9	500.00	Apr. 9	C 7	500.00	
15	CR 10	1,500.00	12	C 7	1,500.00	
16	CR 10	2,500.00	14	C 7	2,500.00	
19	CR 10	1,500.00	16	C 7	1,500.00	
		18,250.00			*18,250.00*	
21	CR 10	2,500.00	19	C 8	2,500.00	
22	CR 10	2,000.00	20	C 8	2,000.00	
23	CR 11	800.00	22	C 8	800.00	
		23,550.00			*23,550.00*	

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

*30	Check 4/22 cancelled	CR 11	2,000.00	23		C 8	4,500.00	4/30	80.74
			21,550.00				*28,050.00*		
29	Checks charged	CR 11	(800.00						
29	back	CR 11	(4,500.00						
30	Kiefer note funds deposited		*26,850.00*						
	to Fays a/c to clear 0/10	J 7	(1,119.26						
May 6	Account ch. 690 not		(*27,969.26*						
	clearing	CR 12	(80.74						
			(*28,050.00*						

Checks issued by Vita-Pakt. *Checks issued by Fay Hansen.*

[* Shown in red. Italicized numbers shown in pencil.]

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

Fay J. Hansen—Drawing Account

Date 1948		Posting Reference	Charges	Date 1948		Credits		
Jan. 6	Advance to Fay	CR 1	$ 50.00	Jan. 1	Balance	$3,870.30	1/31	2,493.34 Cr.
12	Advance to Fay	CR 1	70.00				2/28	2,493.64 Dr.
15	Advance to Fay	CR 1	50.00				3/31	2,856.36
19	Pmt. to P. Shafer	CR 1	500.00				4/30	6,484.36
22	Advance to Fay	CR 2	200.00				5/31	6,584.36
20	Pmt. to Mrs. Penley	CR 1	506.66				6/30	11,755.36
			1,376.66				7/31	12,438.41
Mar. 4	Pmt. to Mrs. Penley	CR 6	3,050.00					
5	Advance	CR 6	200.00					
13	Pmt. to P. Shafer	CR 7	1,000.00					
16	Pmt. to P. Shafer	CR 7	1,100.00					
			6,726.66					
Apr. 7	Final Pmt. to P. Shafer	CR 9	2,521.00					
			9,247.66					
13	Pmt. to Cleone Johnson	CR 10	1,000.00					
6	Advance	CR 9	50.00					
23	Advance	CR 11	50.00					
30	Advance P. Cash	P 6	7.00					
			10,354.66					

(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

May	8	Advance	CR 12	30.00	
	3	Advance	CR 12	50.00	
	25	Advance	CR 13	20.00	
				10,454.66	
June	1	Advance	CR 15	50.00	
	12	Advance	CR 15	50.00	
	16	Advance	CR 15	60.00	
	8	Adv'ce to Bob Chg. to Fay	CR 15	500.00	
	30	Ch. to H. Taylor	CR 16	4,500.00	
	30	Advances P. Cash	P 11	11.00	
				15,625.66	
July	14	Advance	CR 18	50.00	
	24	Advance	CR 18	500.00	
	9	Due Ernst Hdwe. Co.	P 12	72.05	
	2	Advance P. Cash	P 13	18.00)	
	2	Advance to P. Cash	P 13	7.00)	
	8	Advance P. Cash	P 13	3.00)	51.00
	13	Advance P. Cash	P 13	20.00)	
	20	Advance P. Cash	P 13	3.00)	
				16,298.71	

[Italics denote pencil figures.]

Admitted.

Period		Amount						Net	No.
5/1-5/14		200.00		2.00	23.00			175.00	755
5/15-5/29		200.00		2.00	23.00			175.00	782
5/30-6/12		200.00		2.00	23.00			175.00	803
6/13-6/26		200.00		2.00	23.00			175.00	830
2nd	Quarter	1948	1400.00 2540.00	25.40	34.85	202.16		1971.59	—
6-27 7-24		200.00		1.00	23.00				

Admitted.

	Quarter
	Total

Quarter
Total

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(Testimony of Ernest A. Jonson.)

Receiver's Exhibit No. 27—(Continued)

May	8	Advance	CR 12	30.00	
	3	Advance	CR 12	50.00	
	25	Advance	CR 13	20.00	
				10,454.66	
June	1	Advance	CR 15	50.00	
	12	Advance	CR 15	50.00	
	16	Advance	CR 15	60.00	
	8	Adv'ce to Bob Chg. to Fay	CR 15	500.00	
	30	Ch. to H. Taylor	CR 16	4,500.00	
	30	Advances P. Cash	P 11	11.00	
				15,625.66	
July	14	Advance	CR 18	50.00	
	24	Advance	CR 18	500.00	
	9	Due Ernst Hdwe. Co.	P 12	72.05	
	2	Advance P. Cash	P 13	18.00)	
	2	Advance to P. Cash	P 13	7.00)	
	8	Advance P. Cash	P 13	3.00)	51.00
	13	Advance P. Cash	P 13	20.00)	
	20	Advance P. Cash	P 13	3.00)	
				16,298.71	

[Italics denote pencil figures.]

Admitted.

RECEIVER'S EXHIBIT NO. 20

COMPENSATION RECORD

NAME Rosemary A. Hansen

ADDRESS 505 E Blaine Way, Seattle 44, Wash

S S ACCT NO 532-16-0315 EMPLOYEE NO 6

DATE	DEPART. AGENT OR PLACE	OCCUPATION	RATE OF PAY			WITHHOLD DATA	
			PER HR. PER DAY	PER WK.	NO. OF WK.		
1-21-47		Keyp	50 00			1	1

MALE ☒ FEMALE ☐ U.S. CITIZEN YES ☒ NO ☐ DATE OF BIRTH AGE

EXEMPT FROM FED. O.A. ☐ STATE U.I. ☐ INC. TAX WITHHOLD ☐ REASON

DATE EMPLOYED 10/27/41 (IF NOT RETIRED) DATE TERMINATED 12/17/47 REASON:

NAME OF SPOUSE (IF EMPLOYED) Mrs J Hansen PHONE

STATION NO FROM WHICH PAID PAYROLL NO. IF U.S.

* MARITAL STATUS	DATE 1947	TAX PERIOD NO.	EARNINGS SALARY	DEDUCTIONS OLD AGE ANN TY	INC. TAX	PAID NET AMOUNT	CHECK NO.
1 - Single	10/21-31	41	333 33	50	4 80	44 70	302
2 - Married - Claiming Both Exemptions	11/3-11/19	20	100 00	100	13 60	85 40	320
3 - Married - Claiming One Exemption	11/17-11/26	20	100 00	100	13 60	85 40	349
4 - Married - Claiming No Exemption	12/1-12/12	20	100 00	100	13 60	85 40	358
	TOTAL 1947	220	3533 33	350	47 60	2318 70	

COMPENSATION RECORD

NAME [illegible]

ADDRESS 505 E Blaine Way, Seattle 44, Wn

S S ACCT NO 502-07-8074 EMPLOYEE NO 9

DATE	DEPART. AGENT OR PLACE	OCCUPATION	RATE OF PAY			WITHHOLD DATA	
			PER HR. PER DAY	PER WK.	NO. OF WK.		
1/1/47		Housekeeper	100 00			2	2

MALE ☐ FEMALE ☒ U.S. CITIZEN YES ☒ NO ☐ DATE OF BIRTH AGE

EXEMPT FROM FED. O.A. ☐ STATE U.I. ☐ INC. TAX WITHHOLD ☐ REASON

DATE EMPLOYED 1/1/47 DATE TERMINATED REASON

NAME OF SPOUSE (IF EMPLOYED) Rosemary A Hansen PHONE

STATION NO FROM WHICH PAID PAYROLL NO. IF U.S.

* MARITAL STATUS	DATE 1947	TAX PERIOD NO.	EARNINGS SALARY	DEDUCTIONS OLD AGE ANN TY	INC. TAX	PAID NET AMOUNT	CHECK NO.
1 - Single	1/1-1/4		400 00	400	58 50	339 50	474
2 - Married - Claiming Both Exemptions	1/5-1/11		40 00	40	9 30	30 30	486
3 - Married - Claiming One Exemption	1/12-1/25		100 00	100	14 60	69 45	485
4 - Married - Claiming No Exemption	1/26-2/8		200 00	200	29 10	70 00	98 90	525
	2/9-2/15		200 00	200	29 10	67 16	101 74	539
	2/16-2/22		200 00	200	29 10		168 90	601
	1st Quarter	1/1-3/31	1140 00	1140	166 35	152 11	808 79	—
	3/23-4/5		200 00	200	29 10	50 00	118 90	683
	4/6-4/19		200 00	200	29 10		168 90	670
	4/20-5/3		200 00	200	25 00		175 00	711
	5/4-5/17		200 00	200	25 00		175 00	756
	5/18-5/31		200 00	200	25 00		175 00	782
	6/1-6/14		200 00	200	25 00		175 00	803
	6/15-6/28		200 00	200	25 00		175 00	830
	2nd Qtr	4/1-6/30	1900 00 1540 00	1900	254 00	394 85	1291 15	—
	7/7-7/20		200 00	200	29 00			

Admitted.

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(Testimony of Ernest A. Jonson.)

RECEIVER'S EXHIBIT No. 30

Deposited With
The Bank of California
National Association

Vita-Pakt Associates, Inc.
Seattle, Washington, June 30, 1948

Checks

Name or Number of Bank	
Treas. King Co. *Renton School Sales Tax*	$ 3.46
19-10-1250 *Starksen*	2000.00
19-10-1250 *Kiefer*	3000.00
	$5003.46
C 48 202 June 30	5,003.46 D 3

[Italics are pencil notations on original.]

Admitted.

That the records of the corporation do not show that an inventory of the partnership business was made, nor was a bill of sale executed transferring the assets from the partnership to the corporation. That the items of assets and liabilities and capital of the partnership business were entered as the opening entries on the books of the corporation. That the books of the corporation did not show Cleone Johnson, Mrs. Herbert Penley or Paul Shafer as creditors of the corporation as of the time the books were opened. Neither is there any account of the time the books were opened. Neither is there any account shown on the books indicating a liability to

(Testimony of Ernest A. Jonson.)

Fay J. Hansen, nor is there any account showing any stock transactions of Fay J. Hansen. That there is an account entitled "Capital Stock Sales" into which the proceeds of the sales of all stock for which certificates were issued were credited. That the books of the corporation show that 519 shares of stock were sold at $100.00 per share and $51,900.00 received by the corporation and deposited in the corporation bank account. In addition, 96 shares were issued and by notation identified as "bonus" shares, making a total of 615 shares issued. Hansen said that the bonus stock was from his stock. That there is a loan account showing that money was received as loans from certain individuals after the corporation started business, which includes the names of Cleone Johnson, Mrs. Herbert Penley, Mrs. Eva Hansen and the names of various doctors who were also stockholders. The indebtedness incurred by the corporation to Cleone Johnson, Mrs. Herbert Penley and Mrs. Eva Hansen was not paid, according to the books of the corporation, and they have filed claims against the insolvent corporation. That payments made to Cleone Johnson, Mrs. Herbert Penley and Paul Shafer, which were charged to the Fay Hansen drawing account were in repayment of loans by said individuals to Fay J. Hansen in 1947. That according to the stock records of the corporation, no certificate of stock was issued to Fay J. Hansen, except for one share, which certificate for one share was subsequently transferred by Hansen

(Testimony of Ernest A. Jonson.)

to the corporation and reissued to Dr. Burkhart. Hansen is not shown as a stockholder in the stock record book containing a list of the stockholders, nor is there any record of transfer of any shares by Hansen except the one share.

That commencing with January, 1948, the business of the corporation operated at a loss as follows:

January	$2,527.20	April	$7,400.92
February	3,024.61	May	6,426.95
March	6,867.64	June	9,253.85

That after the corporation started in business, money was received and credited on the books of the corporation from the sales of orange juice, stock and the proceeds of loans. That the sales of orange juice and sales of stock for the months of January through June were as follows:

Orange Juice		Stock Sales	
January	$1,877.20	January	$ 3,300.00
February	1,375.33	February	2,200.00
March	1,404.27	March	22,700.00
April	3,390.49	April	4,100.03
May	4,051.52	May	7,500.00
June	4,267.71	June	2,500.00
		July	9,600.00

That I have computed the direct cost of the orange juice, taking into account the cost of the oranges and freight. That for every case of oranges used during May, they were getting approximately 2.27 gallons of orange juice, and the cost per gallon, exclusive of labor and overhead, was $1.31. According to the

(Testimony of Ernest A. Jonson.)

records of the corporation, the corporation sold the orange juice for $1.47 per gallon. That the cost, including labor, of the juice was greater than the selling price. That the average daily amount of orange juice produced during each month was as follows:

January	39.9 gallons	May	78.1 gallons
February	30.3 gallons	June	103.5 gallons
March	30.9 gallons	July	89.2 gallons
April	43.3 gallons		

That from my examination of the Purchase Account, at no time did the corporation ever purchase on any one day oranges or bottles in the amount of $12,000.00 or $15,000.00. That the largest purchase at any one time was the sum of $2,578.30 on May 27, 1948.

That the business consistently lost money and the losses increased as the sales increased, because the orange juice cost more to produce and bottle than the selling price, and the more orange juice that was sold the greater the loss.

According to the records of the corporation, Fay Hansen drew a salary consistently of $100.00 a week, with salaries charged to a "Salary Account." In addition to the Salary Account, there was a Fay J. Hansen Drawing Account to which withdrawals were charged in the sum of a little more than $16,000.00. That the only credits to that account was an initial credit of $3,870.30, which was carried forward from the net worth of the partnership busi-

(Testimony of Ernest A. Jonson.)

ness to the corporation books, specifically this Drawing Account. That, according to the entries in the Drawing Account, Hansen started to withdraw money for his own use from the corporation before any certificates of stock were actually issued to any individual, and prior to the date of incorporation in February. That among the items charged to Fay J. Hansen Drawing Account were payments made on the Hansen residence, automobile and a vacuum cleaner, also an item in the amount of $500.00 in the form of a loan to one, Robert D. Shafer, for which Mr. Shafer executed a promissory note payable to Fay J. Hansen personally.

That there is no authorization in the minute book or any other records of the corporation authorizing Hansen to withdraw such money from the corporation. He told me that none of the stockholders knew about the drawing account.

There were identified, introduced and received in evidence the following exhibits:

> Trustee's Exhibit No. 15—Contract Payment Book. Trustee's Exhibit No. 16—Receipt for taxes on vacant lot. Receiver's Exhibit No. 17—Title Insurance Policy covering Lot 1, Block 3, Arroyo Vista (Vacant Lot.)

(End of testimony of Ernest A. Jonson.)

Drs. Kiefer, Starksen, Dougherty, Chatalas, and Jankelson each testified on cross-examination that

he never made a request for inspection of the books of Vita-Pakt Associates, Inc., which was denied.

Dated at Seattle, this 24th day of February, 1949.

/s/ VAN C. GRIFFIN,
Referee in Bankruptcy.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 37,835
August 24, 1949.

In the Matter of

FAY J. HANSEN,

Bankrupt.

Black J.

PROCEEDINGS

The Court: In connection with the petitions for review of the Referee's decision in the matter of Fay J. Hansen, Bankrupt, I may advise counsel that I have read and reread the various briefs put in by counsel. I have read the transcript of the evidence before the Referee. And I have also read the summary of unreported testimony.

Now, I would like witnesses to appear in this Court. I am anxious for these various witnesses: the Bankrupt personally, the Bankrupt's wife, Dr. John B. Kiefer, Jr., Dr. C. M. Clarkson, Dr. L. R.

Dougherty, Dr. George Chatalas, Mr. Elvin P. Carney, Mr. Ernest A. Jonson, the Receiver, Dr. Burkhart, who does not appear to have testified. Am I right?

Mr. Johnson: You are correct, your Honor.

The Court: Now, I have certain questions I would like to ask, and I would like to see these witnesses that I have named personally present and available tomorrow or Friday. Which now seems most available, tomorrow or Friday, and whether morning or afternoon?

* * *

DR. L. R. DOUGHERTY

being first duly sworn, was examined and testified on oath as follows:

Examination by the Court

Q. Your name, please?

A. L. R. Dougherty.

Q. Doctor L. R. Dougherty? A. Yes, sir.

Q. Did you testify in this matter before the Referee in Bankruptcy on December 8, 1948?

A. Yes, sir.

Q. Have you today read the summary of your testimony on that date as made by the Referee in Bankruptcy?

A. I have read it, yes, sir.

Q. Is that summary a correct summary of the testimony as you gave it?

A. It is correct with this one omission, that I thought I was buying regular corporate stock.

(Testimony of Dr. L. R. Dougherty.)

Q. You thought that you were——

A. That I was buying regular corporate stock as a normal issue of stock and not a personal holding. In other words, I had not thought that I was buying Fay Hansen's stock.

Q. Insofar as the summary is given, is it in accordance with your testimony?

A. Very much so, as near as I can recall.

Q. What you have stated is merely an omission?

A. That is correct.

Q. Are you saying that you gave this statement in your testimony then which you say is omitted from the summary? A. I did.

Q. Is the summary as given true and correct?

A. I say it is, yes, sir.

Q. And this addition which you consider an omission, is that true and correct? A. It is.

The Court: All right. You may step down.

ELVIN P. CARNEY

being first duly sworn, testified on oath as follows:

Examination by the Court

Q. What is your name?

A. Elvin P. Carney.

Q. Your occupation? A. Lawyer.

Q. Where are your offices?

A. 1006 Hoge Building.

Q. Did you testify before Van C. Griffin, Ref-

(Testimony of Elvin P. Carney.)

eree in Bankruptcy, in this Fay J. Hansen bankruptcy matter? A. I did.

Q. On December 8, 1948? A. I did.

Q. Have you read the referee's summary of unreported testimony of yourself on that date?

A. I have.

Q. Is that summary insofar as it appears in accordance with the testimony you gave?

A. Except for omissions and the last paragragh, yes.

Q. The summary is correct except for omissions and the last paragraph. Do I understand that the last paragraph of the summary to which you refer reads as follows: "The referee asked Mr. Carney why these transfers would not constitute a preference, and Mr. Carney said that an individual had the right to prefer creditors, although it might be void in bankruptcy, but at the time he took the conveyances he did not know there was going to be a bankruptcy." Is that the paragraph to which you refer? A. That is right.

Q. Is that paragragh in accord with the testimony you gave?

A. Well, let me put it this way, your Honor. We were sitting there informally. I had completed my testimony, and the referee turned to me and said informally, "Now, off the record, why wouldn't this be a preference?" And I did make the statement in the first place that an individual could prefer his

(Testimony of Elvin P. Carney.)

creditors. What is stated here is correct as far as it goes, but it was not part of my testimony. It was just an informal conference as a lawyer talking with the referee.

Q. Other than that, is that paragraph true?

A. Well, plus the additional fact that I am at a loss to know whether I said this or not, your Honor, the additional fact that I thought was important that should be considered in any such statement made. I stated I had not thoroughly reviewed the question, and further stated that by reason of the fact that a large part of the properties which I insisted Mr. Hansen turn back to us were derived by wrongful diversion of corporate funds. For that reason it was not a preference in the usual sense of the word.

Q. But except for the last paragraph, the summary is in accordance with the testimony you gave?

A. Except for omissions.

Q. Except for omissions?

A. That is right.

Q. Now, what omissions were there?

A. At this conference with Mr. Hansen in my office on July 29—this report does not show the basis upon which I asked him to return—to convey the properties to the corporation. The facts and circumstances relating to that were that Mr. Jonson, who, prior to his appointment as receiver, had audited the books of the company, had brought his report in to me, and we had discussed it. Armed with the

(Testimony of Elvin P. Carney.)

facts which I had from his report plus the conversations with the stockholders, I advised Mr. Hansen that he had grossly misrepresented his sales, that he had reported sales of some seven hundred gallons a day when actually the sales were only about two hundred gallons a day; that he had represented he was making a profit of one hundred per cent on each gallon of juice sold, when, as a matter of fact, he was losing money on each gallon of juice sold—in fact, was not even recovering what it cost for juice and bottles without any consideration for overhead.

I further advised him he had represented the company was in good financial shape when, as a matter of fact, it was hopelessly insolvent and that he had withdrawn funds from the corporation without any authority to do so, and that he had solicited stock subscriptions and borrowings on notes on the theory that the corporation needed money, and that he had taken this money and diverted it to his own personal use in the acquisition of his home, partially for his car, and the furniture, and that he at this meeting on the 29th stated as justification for his withdrawing corporate funds that he was selling his personal stock.

I then told him that he had not represented to the people buying the stock that it was his personal stock, but represented he was raising money for the corporation, and was selling original issue stock, and, furthermore, the minute book, except for one share issued in his name, showed no stock having

(Testimony of Elvin P. Carney.)

been originally issued in his name, and it must be proved he was selling original issue of stock, and that if he was not, it was a misrepresentation to the stockholders.

Then we went into a discussion of these various properties which were transferred to the corporation, one being Mr. Hansen's home, the other being a vacant lot, and the other being household furniture, and another being his car. So we found from interrogating Mr. Hansen that with the possible exception of some $3,000 which he had borrowed from his mother that his equity in the home of some $8500 was acquired solely by the use of corporate funds through those withdrawals that he had made, personal withdrawals, and the same situation existed as to the equity in the furniture. As to the automobile, it appeared that he had traded in an old car for the car which he had, but had diverted $349 of corporate funds for the acquisition of the car.

It appeared the vacant lot was something his wife had been purchasing, and no corporate funds had been diverted in its acquisition. It was being bought on contract, and was not yet paid for. It was based on these misrepresentations and these representations of Mr. Hansen as to his property that I requested that he transfer all of his assets back to the corporation.

Q. Does the summary with the explanation as to the last paragraph and with the addition of what you have now stated correctly represent the testi-

(Testimony of Elvin P. Carney.)

mony you gave before the referee on December 8th last?

A. May I check a moment? (Witness reads summary.) (Resuming): The statement at the top of page 13 is a little indefinite on this question of whether anybody was going to prosecute Mr. Hansen.

As to that I made the statement, which I previously just testified to, and he said, "If I do this, are the stockholders going to prosecute me?" And I told him I could not control the stockholders as to whether they brought prosecution or not, but if he did all he could to make restitution, they would probably feel more kindly toward him, and probably would not, but that I had no power over the matter.

I think with that addition it is in accordance with the facts and my testimony.

Q. Is such summary with the explanation as to the last paragraph and the additions you have made true and correct? A. Yes, your Honor.

The Court: All right. You may step down.

* * *

FAY J. HANSEN

being first duly sworn, was examined and testified on oath as follows:

Examination by the Court

Q. What is your name? A. Fay J. Hansen.

Q. Are you the bankrupt? A. Yes.

Q. And did you testify at different times in the year 1948 before Van C. Griffin, Referee in Bankruptcy? A. That is right.

Q. Was the testimony given by you as transcribed true and correct? A. Yes, sir.

Q. What time did you sign the deed and make the transfers to the corporation?

A. Just before noon.

Q. On what date?

A. I can't remember now.

Q. The month?

A. It was August of last year.

Q. August of 1948? A. Yes.

Q. And did you at that time transfer to the corporation your stock interest in the corporation?

A. That is right.

Q. At the time you transferred your stock interest, how many shares of stock did you own?

A. Right now I cannot recall, sir.

Q. Did you know then?

A. Roughly, yes. I don't remember how we did it. I don't recall exactly how Mr. Carney worded the deal on the stock. Anyway, we had a quick cal-

(Testimony of Fay J. Hansen.)

culation right then in the office when my wife and Dr. Burkhart, being the officers of the corporation, voted me out and voted Dr. Dougherty in, and voted her out, and that is how the thing was worked.

Q. How many shares of stock did you own in the corporation at the time you made the transfer?

A. I could not recall now, sir.

Q. Do you have an approximate idea?

A. It has been so long ago I just don't remember.

Q. Do you have an approximate idea?

A. It would have to be awfully rough. It would be between one hundred and thirty thousand dollars.

Q. Between $100 and $30,000 worth of stock?

A. I just can't remember, sir. I have tried to put this out of my mind.

Q. In number of shares, give me an approximate estimate?

A. Well, a share was $100.00, so you can say one share to 300 shares, roughly.

Q. One to three hundred shares? A. Yes.

Q. How many shares of your stock did you sell?

A. That I can't remember, either, sir. It has been so long ago, and I tried to put everything out of my mind about it. How much of it I sold I can't recall now.

Q. Can you give me one individual to whom you sold any of your stock? A. Yes.

Q. Who?

A. To W. J. Griffin, my father-in-law.

(Testimony of Fay J. Hansen.)

Q. You sold some of your stock to W. J. Griffin, your father-in-law? A. Yes.

Q. When was that? A. In 1948.

Q. How many shares?

A. He got $2,000 worth of stock. That would be 20 shares.

Q. Did he pay you cash? A. Yes.

Q. Where did the cash go?

A. The cash went into the business.

Q. You mean to the corporation? A. Yes.

Q. Had any of those twenty shares ever stood in your name? A. No.

Q. Other than your father-in-law, can you give the name of any individual to whom you sold any of your stock?

A. Well, at the time I was selling this stock, I did not make any bones about which stock was being sold. I mean, I was selling the stock, and they were advised after the stock was all held we would go back and straighten out the situation. We knew how much stock we had to sell, and so forth,—like that, and we were keeping track of it, and after the stock was sold up to a certain point, we would go back and issue a reissue and put the stock stamps in the stock book and so forth, like that. There was never anybody but what knew what stock he was getting.

Q. Did you ever tell anyone other than your father-in-law that you were selling your stock to them? A. No.

(Testimony of Fay J. Hansen.)

Q. In August, 1948, at the time you made the conveyance and transfers to the corporation, did you consider at that time the corporation was hopelessly insolvent?

A. No, I have always felt that the business could have been saved, and in conversation with Dr. Burkhart it was pointed out to him that the machine should be changed. That was a month at least prior to the corporation folding up, and we had planned to make the change, but we just hadn't made the change as yet.

Q. I am not asking you about a month before. I am asking you on the day you made the transfer, did you at that time consider the company insolvent?

A. No, I don't believe so; I think it could have been saved.

Q. You thought at the time you made the transfers the corporation could be saved?

A. That is right. I thought that was the idea in getting the money from me, because they were going to have Mr. Van Loon come up, and they planned to keep the business going.

Q. When did you decide to repudiate the transfers and conveyances?

A. Well, that evening we went to Tacoma to my father-in-law, who lives there, and told them about it, and my brother-in-law was there, and he had this friend who was the prosecuting attorney at Tacoma. He called him that evening and told him the whole

(Testimony of Fay J. Hansen.)

thing, and he advised that we had been blackmailed out of the whole thing. That was his words; and for us to go see an attorney.

So I went to Thomas Todd Saturday morning. That was the following Saturday morning. Thomas Todd felt he was already involved, and recommended another attorney, and the following Saturday morning was when—this was Friday, and the following Saturday morning we went down to the attorney.

Q. Now, at the time you were talking with Mr. Carney, did he tell you that you had made false representations as to the amount of juice being sold and as to the profit? A. I believe so, yes.

Q. Did he make statements to you that you had misrepresented to the stockholders that the money was going into the corporation when in fact you were using part of it yourself?

A. He did, and I explained it to him at that time, that the stock I was selling was my own stock, and I went through the whole thing with him.

Q. Did he tell you that making these false statements in connection with the sale of stock or securing loans was a criminal offense?

A. That is right.

Q. He told you that was a criminal offense?

A. That is right. I think he said a misdemeanor or some darn thing. I don't remember exactly.

Q. Did he say that telling a person you were selling a large quantity of juice when you were not

(Testimony of Fay J. Hansen.)
and getting a loan from such person or selling him stock was a misdemeanor?

A. It was something along that line. I can't recall exactly the actual wording of it, but it was something like that. Also, at the time, if I may interject this—it was not inserted in the other court down below—at the time we transferred this stock and property to the corporation, I asked Mr. Carney,—I said, "How about the money my folks and uncle have in the property and car and so forth?" He said, "That is just your hard luck. You worry about that."

Now, that was not brought out in the case below in Judge Van Griffin's court.

The Court: You may step down.

ERNEST A. JONSON

being previously sworn, was recalled and testified as follows:

Examination by The Court:

Q. Mr. Jonson, you previously were on the stand this afternoon? A. Yes, your Honor.

Q. And I asked you as to a certain summary being in accord with your testimony, and you said it was? A. Yes.

Q. And do I understand that you wish to make a correction?

A. I understand that I originally read the wrong

(Testimony of Ernest A. Jonson.)

copy of the unreported testimony. I read the copy prepared by my counsel rather than the copy prepared by the referee.

Q. Have you now read the summary of your testimony on December 8, 1948, as made by Van C. Griffin, the referee in bankruptcy?

A. I was given a copy by counsel, which purported to be that.

Q. I am handing to you now the summary of unreported testimony adduced Wednesday, December 8, 1948, as reported to me by the Referee in Bankruptcy, and on pages 17, 18, 19, 20, 21, 22, 23 and 24 appears the summary of your testimony as made by the referee. Have you read that?

A. Yes, I have.

Q. Is that summary correct?

A. Except for certain parts regarding the conference between Mr. Hansen, Mr. Carney and myself in Mr. Carney's office.

Q. Is the summary as given as to that correct insofar as it is given? In other words, are there merely omissions, or is the summary incorrect?

A. There are some omissions, and the manner or the order in which the events are stated did not occur in that order.

Q. Then, would you give the correct statements as to what your testimony was?

A. When I arrived at Mr. Carney's office—I believe it was approximately 9:30, and Mr. Hansen and Mr. Carney were there. We started discussing the financial statement I had prepared, which re-

(Testimony of Ernest A. Jonson.)

flected a substantial loss in the business. We also discussed drawings made by Mr. Hansen from the corporation. At that time Mr. Hansen claimed that certain stock he had sold was his, and I told him that the doctors did not understand it that way.

After discussing these points for approximately fifteen or twenty minutes, Mr. Carney told Mr. Hansen that he thought he had done the stockholders a great wrong, and that the only way it could be righted would be for him to sign over his stock in the company, his house, his car, and all his property.

I believe Mr. Hansen's first reactions were that he did not understand, and it was repeated to him. I believe there was again a discussion as to his stock sales, and I believe Mr. Hansen brought up the question as to whether or not he might be criminally prosecuted, at which time he was told that neither Mr. Carney nor myself had any control over that, because we were not the ones who were wronged; it was the stockholders, the ones who put up the money, and it was entirely up to them as to how they felt about the matter. The question of whether he had violated the "Blue Sky" laws was also discussed, and I believe Mr. Carney mentioned it was a gross misdemeanor.

Mr. Hansen then agreed to transfer all his property as requested by Mr. Carney, and he was told to go home and get his wife and come back. Mr. Hansen asked us if either one of us would care to accompany him to insure his return, and we told

(Testimony of Ernest A. Jonson.)
him we had no desire to do so, that he was doing it on his own volition. In approximately an hour Mr. Hansen returned with his wife. I believe the rest of the testimony is correct as shown on the summary.

Q. Is the summary as made by the referee as added to and modified by you on this second appearance by you this afternoon on the stand true and correct? A. Yes, it is.

Q. And is that the testimony you gave before the referee? A. Yes, sir.

ELVIN P. CARNEY

being previously sworn, was recalled and testified on oath as follows:

Examination by The Court:

Q. Mr. Carney, who employed you in connection with this matter?

A. On Saturday, the 24th of July, Dr. Kiefer called me and said he was having some difficulty with the company, and would I meet with him at the office of Vita-Pakt, which I did.

The arrangement for employment was rather unsatisfactory from there on. I was representing a committee. The committee in turn represented a group of stockholders, and they were supposed to raise the funds to pay my fee.

Q. Who was the committee?

(Testimony of Elvin P. Carney.)

A. Well, it was Dr. Dougherty, Dr. Kiefer, and Dr. Burkhart.

Q. Doctors Dougherty, Kiefer and Burkhart?

A. The committee changed from time to time. Let's see who else were the active ones on it. At the first meeting a Mr. Fraser was there, but he was not at any other committee meeting.

Q. What stockholders did this committee represent?

A. Well, they felt they were representing all of them, but when we had a stockholders' meeting, some of them just sat by and said nothing. I have a list of those who contributed to the attorney's fees, if your Honor is interested in that.

Q. How many stockholders were there?

A. I forget that. It was between thirty and fifty, I believe.

Q. Between thirty and fifty stockholders in the company? A. Yes, that is right.

Q. How many contributed to your fee?

A. Let me get my notes, and I can tell you. (Referring to papers.)

A. (Resuming): I know definitely of fifteen.

Q. Fifteen definitely?

A. And there must have been another ten.

Q. There must have been another ten. How many of these had contributed to you even before you talked with Mr. Hansen? A. None.

Q. How many did you know you represented at the time you talked to Mr. Hansen?

(Testimony of Elvin P. Carney.)

A. Well, definitely, just Doctors Kiefer, Dougherty, and Burkhart.

Q. Dr. Kiefer, Dr. Dougherty, and Dr. Burkhart? A. And Mr. Fraser.

Q. And Mr. Fraser. Those were the only ones that you are able definitely to say you represented at the time you talked to Mr. Hansen?

A. With which I had sufficient conversation with them that they said to go ahead on the thing. We had a meeting Wednesday night,—that is the Wednesday before the 30th on which the transfers occurred, in which we outlined some of this, and they wanted me to go ahead and do whatever I thought was best and repeatedly stated they were a committee of stockholders. I want to advise your Honor, too, that in all proceedings we gave notice to all known stockholders of holding a meeting, and told the stockholders what had transpired.

Q. When was that?

A. That was about a week afterwards.

Q. About a week after the transfer?

A. Yes.

Q. And how many stockholders came?

A. Oh, there was about 30 of them there.

Q. About 30 present? A. Yes.

Q. And how many of those affirmatively approved what was done?

A. There was no exception taken, I will put it that way, to what I had done.

Q. No exception. Was there any signature of

(Testimony of Elvin P. Carney.)

approval?

A. No. In other words, at this meeting we told the stockholders what facts we had found, and what we had done, and then discussed with them the possibility of saving the company.

* * *

Q. Did you know how many stockholders you represented at that time? A. No.

Q. Did you tell Mr. Hansen how many stockholders you represented? A. No.

Q. Do you know now how many stockholders you represented at that time?

A. No. All the stockholders were asked to contribute to my fee.

Q. Did you at that time purport to represent the corporation, or did you purport to represent some of the stockholders?

A. At this meeting with Mr. Hansen, some of the stockholders.

Q. Did you tell him who they were?

A. He knew from our meeting on Saturday that I had been called in by Dr. Kiefer and the other members of the committee that were there at the Saturday meeting.

* * *

The Court: I will ask no more questions of the witnesses at present. I am satisfied to put no more questions to the present witnesses. Now, is there anything that any counsel would like to do at this time?

(Testimony of Elvin P. Carney.)

Mr. Wiley: Mrs. Hansen is here, if you wish to call her.

The Court: I have stated that I have asked all the questions that I care to ask at this time of the witnesses present. Now, is there anything any counsel would like to do?

(No response.)

(Discussion off record between Court and counsel concerning appearances of witnesses tomorrow.)

The Court: The matter is continued until eleven o'clock tomorrow morning.

I will expect Mr. Wiley here personally. I will expect counsel for the receiver to be here personally, and counsel for the trustee is to be here as long as he can, and he is consenting that the proceedings may be carried on in his absence when he must leave.

* * *

Continuation of Proceedings, 11:00 o'Clock A.M.

August 26, 1949

DR. JOHN B. KIEFER, JR.

being first duly sworn, testified on oath as follows:

Examination by The Court:

* * *

Q. Well, I will ask you, Dr. Kiefer, is this summarized statement of your testimony other than

(Testimony of Dr. John B. Kiefer, Jr.)
with the possible reference to Receiver's Exhibit 18 in accordance with the testimony you gave?

A. Yes.

Q. The summary is correct as you remember it?

A. Yes.

Q. Is the summary true? Is the testimony as summarized true? A. Yes, sir.

* * *

Q. Now, is there anything further you would like to say?

A. Well, only in reference to the distribution of stock. These figures show that we were led to believe that the only sale of stock would be the stock so designated, and no stock given to Fay Hansen was to be sold.

Q. Who told you that?

A. Fay Hansen told us that.

Q. He told you that no stock distributed to him was to be sold?

A. That is right. In other words, there was to be no profit made by himself during this developmental stage other than the $440 monthly income or salary.

Q. Who was that to be paid to?

A. That was to be paid to Fay Hansen.

Q. What was to be done with the monies from the sale of stock?

A. $16,000 cash was for a working fund for the business. There was $5,000 of notes outstanding,

(Testimony of Dr. John B. Kiefer, Jr.)

which was to be cared for, and $18,000 was going to Paul Shafer, to pay his uncle.

Q. What else?

A. That was all. That was the way the structure was to be built up. In other words, $39,000 was to be raised and allocated to operating the business in this manner. That is why this evidence does not correspond there.

Q. How many shares of stock did he tell you he was to get? A. 300 shares.

Q. He told you he was to get 300 shares?

A. Yes.

Q. When did he tell you that?

A. On February 20th.

Q. What year? A. 1948.

Q. Did you know he had any drawing account other than his salary?

A. No, I did not, and he definitely told us many times that the $440 was all he was withdrawing.

Q. Were there any loans made by anybody to the company? A. Oh, many.

Q. Did you loan any money?

A. Yes, I loaned money on about four different occasions.

Q. Altogether how much?

A. About $7,000.

Q. Has any of that been paid? A. $3,000.

Q. $4,000 is still due you?

A. No, I am wrong. Just a minute. $9,000 was loaned, and $3,000 of that was returned.

(Testimony of Dr. John B. Kiefer, Jr.)

Q. There is $6,000 still owing you on loans?

A. That is correct.

Q. What were you told the proceeds of such loans were to be for?

A. Well, in the first place, for over-purchase on bottles for his juice and $16,000 reserve. That was for working capital. He had no funds with which to proceed. So I was theoretically buying oranges. On one occasion — I forget which deal it was, whether it was the last or not—he came to me and said he had an opportunity to buy a carload of distress oranges from the Sunkist people. Someone had ordered it and failed to take them over, and these oranges were wrapped. Of course, most of the oranges were unwrapped, and in my frequent visits to the plant there were no wrapped oranges that entered the plant after that loan was made. So I took it that it was just an out-and-out lie to me.

* * *

DR. HAROLD BURKHART

being first duly sworn, testified on oath as follows:

Examination by The Court:

* * *

Q. Assuming this corporation, Vita-Pakt Associates, was incorporated about February, 1948, about when did you meet Mr. Hansen?

A. Oh, in the fall. I would say around October.

Q. 1947? A. Yes.

(Testimony of Dr. Harold Burkhart.)

Q. Did you become a stockholder of this corporation? A. Yes, sir.

Q. How many shares did you have?

A. Well, personally, I had three shares, that is, I had one, and my two daughters each had one.

Q. How much did you pay for them?

A. I paid $100 for mine, and for theirs, each.

Q. You mean $100 each? A. Yes.

Q. Did you buy any other stock?

A. No, sir.

Q. Did you ever have an interest in any other stock, other than such interest as you had in these three shares?

A. Only to the extent that I hoped eventually that Mr. Hansen might reward some of the effort that I was putting forth to help them by giving me some of his personal stock, although he never promised it.

Q. You knew he had some personal stock?

A. Yes, quite a good deal.

Q. Did you know what his personal stockholding was?

A. Only approximately. It was supposed to be in the neighborhood of forty thousand.

Q. What? A. $40,000.

Q. On the basis of $100 per share, about 400 shares? A. Something like that.

Q. Where did you learn of such approximate number of shares?

A. By what he told me, is all I know.

(Testimony of Dr. Harold Burkhart.)

Q. And you say you hoped he might reward you?

A. Yes.

Q. You were making efforts then in his behalf?

A. Well, I was making efforts actually in behalf of the company, because I felt it was a very greatly needed enterprise in Seattle.

Q. What did he tell you as to whether or not the sale of orange juice was being made at a profit or a loss?

A. Well, he constantly told us, to me individually and the group, that it was being sold at a profit, a considerable profit.

Q. Did you know that he was selling his personal stock?

A. I can't be sure because he told me a number of different things which I afterwards questioned, but I felt that his personal stock was being involved somewhere in some of the transactions.

Q. Well, other than as a bonus, did you understand that his personal stock was being sold?

A. No, I did not. I knew he told me that he was giving some of his personal stock as a bonus.

Q. Did you loan any money to the company?

A. No, sir.

Q. Did you become an officer of the company?

A. Yes, sir.

Q. When?

A. Oh, I think—well shortly after the company was organized, Mr. Todd, who had been acting as attorney for the company, requested that his name

(Testimony of Dr. Harold Burkhart.)

be taken off and a Board of Directors elected, and it was, I should say, probably in March some time of 1948.

Q. What officer did you become?

A. Vice President.

Q. Did you ever become any other officer?

A. No, sir, there was never a stockholders' meeting during the time I was in office.

* * *

The Court: All right. Are there any questions by any attorneys of Dr. Burkhart?

Mr. Wiley: Yes.

Examination by Mr. Wiley:

Q. Dr. Burkhart, the stock that you received from Fay Hansen was given in payment of a dental bill that he owed you, was it not?

A. My one share of personal stock, yes, but I paid for my daughters' two shares and paid in cash.

Q. And you knew that was his own personal stock he gave you for the dental bill?

A. No, that was just regular stock that was being sold.

Q. You say "regular stock." There wasn't anything irregular about the stock?

A. I don't mean that. I mean it was capital stock set aside as stock to be sold. He had his own personal stock and this stock to be sold.

Q. I thought you said, and you have told me

(Testimony of Dr. Harold Burkhart.)
that at one time he was selling a lot of his own personal stock to help the company out?

A. Yes, I understand that. Now, just a moment. It may be that the share of stock that he gave me might have been from his own personal stock. That might possibly be, but the other two that I bought for my daughters was company stock. That is a little detail I am not clear on.

Q. And you examined the corporation books, didn't you?

A. Well, I looked over—no, I have never seen the corporation books themselves.

Q. Didn't you see the papers Mr. Thomas Todd drew up, that sheet of allotment of shares?

A. Oh, yes. I saw it, but I don't remember the details now.

Q. And if those books showed Mr. Hansen was to get 530 shares, you were familiar with that?

A. I could not be sure of any figures on that because my memory is not too good.

Q. But you did see the books showing the allotment of shares?

A. Yes, I saw them; yes, indeed.

* * *

DR. GEORGE CHATALAS

being first duly sworn, testified on oath as follows:

Examination by The Court:

* * *

Q. Have you read the summary of your testimony as made by the Referee in Bankruptcy, Van C. Griffin? A. Yes, I have read it.

Q. The summary of your testimony on December 8, 1949, before the Referee in Bankruptcy in this matter? A. Yes, I was just reading it.

Q. Well, you may finish reading it. You may take your time to do so.

A. (Witness does so.)

(Recess.)

Q. Dr. Chatalas, you have read the summary?

A. Yes, I have.

Q. Is the summary correct? A. Yes, sir.

Q. This is the testimony you gave before the Referee in Bankruptcy?

A. That is right, your Honor.

Q. And is that testimony as summarized true?

A. Yes, it is.

Q. Did you know Mr. Hansen was selling any stock of his own?

A. No, sir. The only inkling I had of that, that he had stock of his own, was that it was bonus stock which he was offering to some of the stockholders if they would buy more shares of stock in the corporation, or if they were responsible for

(Testimony of Dr. George Chatalas.)

selling for him then he would give them a hundred dollars worth of stock as a bonus from his own personal supply.

Q. What did he say was to be done with the proceeds from the stock sold?

A. That was to buy new equipment, because the equipment he had at that time was only producing about 300 or 400 gallons a day, and he had demands for around 700 or 800 gallons a day, and that he had to buy new equipment.

Q. Did you know about any loans being made by stockholders to the company?

A. He contacted me to lend him some money.

Q. Did you? A. No, sir.

Q. What did he tell you was to be done with the money that he wished you to loan?

A. That he was in a jackpot as far as money was concerned to buy oranges, and the business could not be kept up because he had to have the oranges in order to produce orange juice. I asked him once or twice how come there wasn't money enough since he was selling so many gallons of juice a day,—why didn't he have enough money to buy oranges, and he told us in that one meeting that he got himself in a mess by buying too many cartons, about $15,000 worth of cartons to put juice in, and that is what left the company short of capital.

* * *

OPINION OF THE COURT

The Court: I may say, gentlemen, I am ready to state my conclusions.

My conclusions are quite opposite to the conclusions of the Referee. It is clear from the transcript of the evidence and the evidence that I have heard yesterday and today that Mr. Hansen grossly deceived those who invested their money for stock and grossly deceived those who made loans. It is clear by the overwhelming preponderance of the evidence that those who bought stock and paid money and those who made loans, paid the money and made the loans upon the assurance by Mr. Hansen that the money was to be used as working capital for the company. It is clear by the overwhelming preponderance of the evidence that Mr. Hansen grossly misrepresented the amount of orange juice that was being produced, that he grossly misrepresented the condition of the company, and grossly misrepresented the profit, saying that a substantial profit was being realized when each gallon of orange juice was being sold at a loss.

Unquestionably, $4,500 was traced from the corporation to the purchase of a house. Not a cent, under the overwhelming evidence, of that $4,500 could have come from stock sales. Such was the proceeds of loans which were made for the purpose of helping the company operate. Without the loans the company had no money. With the loans the company had more than $4,500 which Mr. Hansen speedily misappropriated.

So I may say that not only by the preponderance of the evidence but beyond all reasonable doubt under the evidence $4,500 of corporate funds went into the house.

By the great preponderance of the evidence a thousand dollars further of corporate funds went to the house. By the preponderance of the evidence the figure which I recall as between three and four hundred dollars went from corporate funds towards the purchase of an automobile. Under the overwhelming evidence the corporation never made a demand upon Mr. Hansen to do anything. Mr. Carney, representing a vague group of some of the stockholders, advised Mr. Hansen upon Mr. Hansen's inquiry, that the stockholders would feel much more kindly toward Mr. Hansen if he made his best efforts at restitution of his unauthorized extractions of money from the corporation by transferring certain property.

He was told that whether the stockholders would or would not prosecute was not under Mr. Carney's control. Mr. Hansen was advised by Mr. Carney that in Mr. Carney's opinion the stockholders would not prosecute if he did make the transfers. Mr. Hansen was told that his violations of law concerned his misrepresentations as to the purpose of the stock proceeds, the purpose of the loan proceeds, that his misrepresentations included claims by him that he was making a profit from orange juice when he was selling at a loss, and his misrepresentation

that the sale of orange juice was large in quantity when it was only a fraction thereof.

Mr. Hansen was also told that in addition to these various offenses, which it would seem would constitute felonies under the law, he had also committed a misdemeanor by doing certain acts without a license as required by what has been referred to as the State "Blue Sky" law.

Mr. Hansen did not make a transfer to merely the clients represented by Mr. Carney. Mr. Hansen and his wife made a transfer to the corporation for the benefit of all the stockholders insofar as the transfer could benefit them, including his own father-in-law. He had a moral and a legal obligation to try to return to the corporation the funds which he had taken without authority.

I don't know whether he sold any of his stock or not. At least, his actions and conduct and statements led the stockholders to believe that the stock that was being sold was the stock of a corporation for the benefit of the corporation, and that he, personally, was donating some of his own personal stock as a bonus to stimulate sales.

If, however, it should be held that 49 shares of the stock by the calculated guesses was a sale of his stock, then under his evidence he got the benefit of such by payments to certain persons which payments, under his testimony, he was personally obligated to make.

His conveyances and transfers were voluntary on his part, stimulated by his idea that it was good

policy for him to make the transfers with the hope that the stockholders would not prosecute him. He had no promise that he would escape prosecution by such transfers. There was no threat made to him that if he did not make the transfers he would be prosecuted. He was advised he had broken the law.

At the time he and his wife made the transfers, he acted for what they thought was their best benefit selfishly. In so acting Mr. Hansen was acting in accord with what he should have done. Certainly, it shocks the conscience that a man should do what the evidence shows he did do, and that he should get the benefit and that the stockholders and those who loaned the money in good faith should sustain the loss.

I have heard not a syllable of explanation by Mr. Hansen in justification of those gross misrepresentations. In effect there has been a callous disregard on his part of his moral obligations. I have searched through the record and cannot understand what excuse even he makes for the deceit he practiced. If he sold any of his own stock, he did it surreptitiously. He was not able yesterday to give me the name of a single individual to whom he had sold his own stock except his father-in-law. He having been wholly unconcerned with the truth as to the stockholders, there is no reason for me to place any credence as to what he claims about the sale of stock to his father-in-law. But if he did sell his father-in-law twenty shares, that would be

twenty of forty which were sold over what would have been the stock belonging to the company providing he was entitled to 531 shares.

One stockholder in good faith testified that he was told by Mr. Hansen that Mr. Hansen was to get 300 shares which he was to hold. Another stockholder understood it was 400 shares. Under either of such statements there were no 49 shares of Mr. Hansen's stock to be sold.

The receiver will be entitled—just a moment. I will ask a question. The house was sold for how much—the equity?

Mr. Walsh: I don't know the exact figure, but about $8,500.

The Court: The car was sold for how much?

Mr. Walsh: If you will bear with me a moment, I will tell you exactly.

The net on the house was $7,051.30.

The Court: $7,051.30. And the car?

Mr. Walsh: The net again on the car was $469.29.

The Court: What about the household furniture?

Mr. Walsh: $1,514.

The Court: Net?

Mr. Walsh: Net. Those are my figures.

The Court: All right.

Mr. Walsh: They were sold—I should preface it by saying they were sold in a lump. For instance, the furniture and house and car and vacant lot all went as one parcel, and they have never been actually segregated.

The Court: How much money came from the vacant lot? Is it included in these figures?

Mr. Walsh: No, it is not.

The Court: The vacant lot——?

Mr. Walsh: $236 net.

The Court: The receiver will receive $5,500 plus $349, or thereabouts, that represented the car, plus $320, which I understand the receiver paid to protect the lien. The balance of the proceeds will go to the trustee.

Mr. and Mrs. Hansen voluntarily for their own selfish benefit made the transfer. It was a selfish benefit for themselves that they were thinking of, but what they did was in accord with what Mr. Hansen as an honest man should have been glad to have done. For some reason or other, after he made the transfer, he decided that another course of action was for his benefit, and he attempted to repudiate his transfer.

We are not in the situation where a corporation coerced a man to do something for the benefit of a corporation. We are in the situation where an attorney representing two or three or five or ten stockholders advised a man that he had wronged the stockholders, and that he felt satisfied that the stockholders would feel more kindly toward him if he did that which he ought to do. It is not a case of where an attorney demanded restitution be made to his clients. It is where an attorney suggested a certain course of action as proper and that the transfer should be made to the corporation for all the stockholders' benefit, including the father-in-law.

Other than these items that have been traced by the substantial preponderance of the testimony and in part beyond all reasonable doubt, the transfers were sufficiently of the nature of a preference of a corporation creditor to entitle the trustee to the balance of what has been obtained above the specific items I mentioned.

Mr. and Mrs. Hansen chose at one time for their benefit to do a certain thing, to prefer the corporation, because they thought it would help Mr. Hansen. They voluntarily transferred what in part might have been exempt. It is very difficult for me to believe that under the history of the house that house would have been exempt to them when Mr. Hansen only obtained the $4,500 for the house by inexcusable and gross deceit practiced upon men whom he induced to make a loan for the benefit of the corporation. It is very difficult for me to understand that justice, equity or law could be in accord with his keeping the fruit of such fraud.

I have based my decision upon the record plus the evidence which I have heard in court, supplemented by the fact that I have had an opportunity to look at the witnesses and see their manner of testifying. Certainly, the evasive testimony of Mr. Hansen yesterday supported the appearance of evasiveness in his testimony as transcribed previously.

The version of a man who did not know whether he had a dollar's worth of stock or thirty thousand in a company that he had organized a little more than a year ago, and which ran its course about a year ago is incredible.

Judgment and such findings as may be appropriate may be presented in due course after notice.

Mr. Johnson: May I raise two questions?

The Court: You may.

Mr. Johnson: First, with respect to two items set forth in the petition for review. One is a small amount, but I feel we should have it. It is $72.00 for the vacuum cleaner paid for directly by corporation funds. The evidence is in the record pertaining to it.

The Court: Well, I am not satisfied by the overwhelming testimony that I can trace such, or I am not satisfied that the preponderance of the evidence traces such, and that $72.00 will go to the trustee.

Mr. Johnson: Is your decision the same with respect to the $500 promissory note?

The Court: Yes, I have made a statement of the amount the corporation is entitled to receive——

Mr. Johnson: Thank you, sir.

The Court: ——which, as I remember it, is about $5,500, plus about $349 plus about $320. The trustee gets the balance and the bankrupt none.

I appreciate the attendance of the parties. I regret the delay that has been occasioned in my decision. There were many complications as to the evidence itself, and other duties interrupted. Ultimately, I felt that the summary of the untranscribed testimony was so important that I should have the witnesses, the important witnesses at least, verify under oath the correctness of the summary, if such was correct, or to supplement such if they deemed such necessary. Further, I was left in the dark by

the record as to whom Mr. Carney represented. It, of course, is a puzzle yet. I doubt very much if he would have been able to have collected a fee against more than two or three stockholders. There may have been a later ratification of his action by stockholders when they subscribed to his fee, but that ratification was subsequent to what transfers Mr. Hansen made; and, of course, Mr. Carney was not speaking with authority for such individuals because he did not know who his clients were.

I was also anxious to see Mr. Hansen personally.

The decision I have made is the best I can make; I hope it is entirely correct. I am sure that in substance it is in accord with what the decision ought to be.

Thank you for returning this morning.

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed February 9, 1950.

In the District Court of the United States, for the Western District of Washington, Northern Division

No. 37,835

In the Matter of

FAY J. HANSEN,

Bankrupt.

Black, J.

STENOGRAPHIC TRANSCRIPT
OF PROCEEDINGS

October 17, 1949

* * *

The Court: The Court also is interested in having presented today by evidence as may be introduced by the interested parties as to the history of any motions to amend and as to any reconsideration of the exemption order.

You may proceed, gentlemen.

Mr. Walsh: I would like to be sworn.

WILLIAM J. WALSH, JR.

being first duly sworn, testified on oath as follows:

* * *

The Witness: On October 20, 1948, the Referee by order approved the trustee's report of exempt property but did not, as is customary, order immediate delivery of the property to the bankrupt. More than ten days thereafter and at a time when

(Testimony of William J. Walsh, Jr.)
the show cause hearing was in progress wherein Ernest A. Jonson had been ordered to show cause why certain transfers to Vita-Pakt Associates should not be set aside as a voidable preference, and at the time of hearing the matter of voidable preference was joined in by the bankrupt, and the order to show cause was joined in by both the bankrupt and the trustee, when the evidence had been concluded in that matter and at the time the findings of fact and conclusions were being presented to the Referee and the Referee had indicated he would not find one way or the other as to whether or not the transfers to Vita-Pakt Associates had been procured by duress, the trustee through his attorneys moved orally that his petition for order to show cause be amended to include a petition that the order allowing the bankrupt's exemptions be reconsidered and the exemption order set aside.

The Referee, to the trustee's information, granted that petition and stated the trustee's petition would be deemed to be orally amended to embrace the petition aforementioned and further stated the evidence introduced at the show cause hearing would be considered as applying to the trustee's petition to vacate the order of October 20, 1948, wherein the bankrupt was granted his exemptions.

After hearing argument on the trustee's amended petition to vacate such order the Referee orally decreed the trustee's petition to set aside the prior order granting bankrupt's exemptions would be denied. In entertaining the petition that the Referee's

(Testimony of William J. Walsh, Jr.)
order approving the allowance of bankrupt's exemptions be reconsidered and said exemptions be disallowed the Referee stated that the evidence as to whether the transfers were involuntary or whether they constituted voidable preferences would be borne in mind.

The Referee listened to argument of counsel that under the evidence brought to light at the hearing the previous order allowing the exemptions was erroneous as a matter of law. The Referee further stated that despite the 1938 amendment of Section 6 of the Bankruptcy Act he doubted that a mere voidable preference would result in the loss of the bankrupt's exemptions in the property so transferred and that in any event he did not think he had authority to set aside his own order after the time for appeal therefrom had expired.

Subsequently, when new findings and conclusions and judgment were presented to the Referee for signature, the parties in court in the Referee's presence and with the aid of the Referee reduced their objections and compromises in regard to the findings and conclusions to writing. It was further proposed that the receiver, having previously typed the findings and conclusions, and the bankrupt's attorney having typed the judgment—I will correct that—these proposed findings and proposed judgment—the trustee's attorney volunteered that he would have findings and conclusions as corrected typed and the bankrupt's attorney volunteered that

(Testimony of William J. Walsh, Jr.)

he would retype, if necessary, the judgment. The only change in the judgment was to be in the Referee's oral ruling, the statement that "the petition of the trustee to have the Referee's order approving allowance of bankrupt's exemptions set aside is denied."

The bankrupt's attorney protested that this was unnecessary and that it would involve retyping of the order, and asked that the proposed judgment without this addition be accepted by all parties in view of the fact that the findings of fact stated, "The pleadings of the parties will be deemed amended to embrace a petition of the trustee that the Referee's order approving the allowance of bankrupt's exemptions be reconsidered and said exemptions be disallowed." Also, that the conclusions of law stated in paragraph IX, "that the bankrupt is entitled to claim exemptions in certain proceeds of sales as provided by the laws of the State of Washington, * * *" and "that the petition of the trustee to have the Referee's order approving the allowance of the bankrupt's exemptions set aside should be denied."

Such quoted portions of the findings of fact and conclusions of law are on record herein.

In view of the argument of the bankrupt's attorney and as an accommodation to him, the trustee permitted the order to be entered without any change. Thereafter the trustee's attorney, thinking that the bankrupt's attorney might take undue ad-

(Testimony of William J. Walsh, Jr.)

vantage of this accommodation to him, petitioned the Referee in Bankruptcy to enter a supplemental order on the show cause hearing reciting therein, "that the order on show cause hearing entered herein January 17, 1949, be and the same is hereby supplemented by the addition of a paragraph number IV to read as follows, 'the petition of the trustee to have the Referee's order approving the allowance of bankrupt's exemptions set aside is denied.' "

That special supplemental order I believe to have been entered on February 11th, but the exact date appears of record herein.

* * *

The Court: It will be filed as an exhibit.

Before the matter of cross-examination is taken up, I wish to be sure I heard the witness right. Do I understand that at one time the attorney for the bankrupt offered to rewrite the order and findings and thereafter decided not to?

The Witness: I believe—I cannot say for sure, but I believe the attorney for the bankrupt offered to do so if there was to be any change made. He then indicated that the change would be so slight and would be encompassed in the findings and conclusions at all events, that it would be an unnecessary act and that he proposed it be signed as previously submitted if I would so agree. As an accommodation the trustee's attorney so agreed.

* * *

(Testimony of William J. Walsh, Jr.)

Cross-Examination

By Mr. Wiley:

Q. Mr. Walsh, did I ever make any representation or agreement of any kind with you that I would not take advantage of anything that was in the record? A. No.

* * *

CARL A. JONSON

being first duly sworn, testified on oath as follows:

Examination by The Court:

Q. Aside from the question of cost of sale and the trustee's suggested allocations, do you agree or disagree with the testimony that the previous witness has given?

A. I am substantially in accord. To the best of my recollection, as indicated, I had prepared proposed findings of fact and conclusions of law, and likewise a proposed judgment. The Referee in determining what findings would be made went over my findings line by line, and, of course, changes were made since they did not or were not in accordance with his oral decision. Thereafter it was agreed that Mr. Walsh would prepare the findings and Mr. Wiley prepare the order. At the time they were presented I recall Mr. Walsh calling it to the attention of the referee that Mr. Wiley had made no provision in the order for the matter of denial

(Testimony of Carl A. Jonson.)

of motion to deny the exemptions, and the discussion was about as stated, that it was not necessary to retype the order, and rather than have the order retyped and have us go up there again, it would be entered as it was. Subsequently the matter was reargued upon Mr. Walsh's presentation of a supplemental order before the Referee. As I recall it, the Referee had no independent recollection of his own of what had transpired, but on the basis of my recollection and Mr. Walsh's recollection the Referee did sign the supplemental order.

* * *

The Court: Does the trustee wish to call the Referee as a witness? I am not requiring it.

Mr. Walsh: I would like the Court to have the Referee's testimony if he has any independent recollection of what transpired on January 17th. I will call Judge Griffin.

VAN C. GRIFFIN

being first duly sworn, testified on oath on behalf of of the trustee as follows:

Direct Examination

By Mr. Walsh:

Q. Judge Griffin, on January 17th, at which time the order on the show cause hearing was signed by yourself in your capacity of Referee, do you recall argument between myself and Mr. Wiley, attorney

(Testimony of Van C. Griffin.)

for the bankrupt, as to whether or not his judgment on the show cause hearing conformed with your oral decision?

A. I don't have any recollection of the date being the 17th. I do remember you and Mr. Wiley were before me more than once, and I do remember the matters as you testified to generally. But as to stating that on a certain date you had a certain discussion, I can't say.

* * *

Mr. Wiley: I would like to be sworn.

ALEX WILEY

being first duly sworn, testified on oath on behalf of the bankrupt as follows:

The Witness: My recollection is that in the Referee's memorandum decision he said that the bankrupt might apply to the Court for the allowance of exceptions, and later on when the order was entered, as a matter of strategy, I did not think it was necessary to have the exemptions allowed in that order. The Referee had not indicated clearly that he would allow them and Mr. Walsh and he had talked several times about the question. I always tried to get him to leave the matter of exceptions out because I considered my prime opponent was the receiver, and he had talked constantly of appealing. I thought I would like to limit the

(Testimony of Alex Wiley.)

question on review to his rights, and Mr. Walsh and I often talked about the question of exemptions being something we could probably get together on and settle. It was for that reason I did not want in the final order any definite order disallowing the exemptions, and I did not think that the order the Court entered from which the review was taken definitely decided one way or the other the bankrupt's right to exemptions. Later on Mr. Walsh apparently changed his mind and wanted to inject that question into the order, and for that reason proposed the supplemental order. I opposed it before the Referee because I stated I thought it was improper for the Referee to enter another order while the matter was on review then, and I did not think it was necessary as far as the issues of the case then were and that when the review was disposed of Mr. Walsh and I could thrash out the question of exemptions.

* * *

Cross-Examination

By Mr. Walsh:

* * *

Q. Mr. Wiley, you did ask that you not have to retype your judgment to embrace the paragraph which I asked to be entered "that the petition to disallow the bankrupt's exemptions is hereby denied"?

(Testimony of Alex Wiley.)

A. I think I told you I did not think it had any part in the order and should not be there, and for that reason I wanted it signed the way it was.

Q. Did you ever ask that you not be required to retype the order because it was an unnecessary act and was implicit in the order because it was embraced in the findings and conclusions?

A. No, I absolutely deny that.

The Court: Are you through?

Mr. Walsh: Yes.

* * *

The Court: The Court, from the testimony of Mr. Jonson and Mr. Walsh and from the other testimony presented by the other witnesses, is satisfied that the motion to amend the petition to include the matter of exemptions was before the Referee, and that such motion was denied, and the Court is satisfied from all that it has heard that at the time the formal order was entered that it was the position of the attorney for the bankrupt that it was unnecessary for such order to be amended in order to make effective the denial as set forth in the findings and conclusions.

* * *

Certificate

I, James R. Royse, do hereby certify that I am official court reporter for the above-entitled Court, and as such was in attendance upon the hearing of the foregoing matter.

I further certify that the above transcript is a true and correct record of the matters as therein set forth.

/s/ JAMES R. ROYSE,
Official Court Reporter.

[Endorsed]: Filed March 3, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK UNITED STATES DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as Amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith all of the original pleadings on file and of record in said cause in my office at Seattle, together with reporter's transcripts of proceedings, and Exhibits 1 to 19, inclusive, 21, 21a, 22, 22a and 23 to 55, inclusive, as set forth below, and that said pleadings, reporter's transcripts and exhibits constitute the record on appeal from the Order on Petition to Review and Final Judgment filed November 1, 1949,

and entered November 2, 1949, to the United States Court of Appeals for the Ninth Circuit, to wit:

1. Debtor's Petition and Schedules.

2. Adjudication of Bankruptcy and Order of Reference.

3. Statement of Affairs.

4. Bond of Trustee R. C. Nicholson.

5. Letter from Referee in Bankruptcy to Clerk of Court.

6. Letter from Referee in Bankruptcy to Clerk of Court.

7. Additional Bond of Trustee R. C. Nicholson.

8. Referee's Certificate on Review, attached to which are the following:

8-1. Trustee's Report of Exempt Property.

8-2. Order Approving Trustee's Report of Exemptions.

8-3. Bankrupt's Petition for Issuance of Order Show Cause.

8-4. Order to Show Cause.

8-5. Special Appearance by Johnson & Dafoe, Attorneys for Receiver Vita-Pakt Associates, Inc.

8-6. Trustee's Motion, and Order, attached to which is proposed form of stipulation.

8-7. Stipulation dated November 26, 1948, re sale of property.

8-8. Trustee's Petition for Issuance of Order to Show Cause.

8-9. Order to Show Cause dated November 29, 1948.

8-10. Answer of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., to Petition and Order to Show Cause of Fay J. Hansen, Bkpt.

8-11. Answer of Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., to Petition and Order to Show Cause of Trustee of Estate of Fay J. Hansen, Bankrupt.

8-12. Reply of Bankrupt to Affirmative Defenses of Ernest A. Jonson.

8-13. Trustee's Reply to Receiver's Answer.

8-14. Referee's Memorandum Decision dated December 30, 1948.

8-15. Proposed Findings of Fact on Order Show Cause Hearing (rejected by referee).

8-16. Notice by Receiver of presentation of objections and exceptions to Findings, and Objections and Exceptions attached thereto.

8-17. Referee's Findings of Fact on Order Show Cause Hearing, and Conclusions of Law on Show Cause Hearing.

8-18. Referee's Order on Show Cause Hearing.

8-19. Receiver's for Extension of Time to file petition for review.

8-20. Referee's Order extending time to file petition for review.

8-21. Referee's Order extending time to file petition for review.

8-22. Petition for extension of time to file petition for review, by trustee.

8-23. Petition for Review, by Receiver.

8-24. Petition for Review of Referee's Order, by Trustee.

8-25. Trustee's Motion for Supplemental Order on Show Cause Hearing.

8-26. Referee's Supplemental Order on Show Cause Hearing.

8-27. Trustee's Trial Brief and Memorandum of Authorities.

8-28. Trustee's Supplemental Trial Brief and Memorandum of Authorities.

8-29. Receiver's Memorandum of Authorities.

8-30. Receiver's Supplemental Memorandum of Authorities.

8-31. Receiver's Second Supplemental Memorandum of Authorities.

8-32. Bankrupt's Brief.

8-33. Bankrupt's Brief.

8-34. Reporter's Transcript of the Proceedings.

8-35. Summary of Unreported Testimony Adduced on Wednesday, Dec. 8, 1948.

9. Letter from Referee in Bankruptcy to Clerk of Court.

10. Memorandum of Authorities on Behalf of Trustee.

11. Receiver's Memorandum of Points in Support of Petition for Review.

12. Bankrupt's Brief Answering Trustee.

13. Bankrupt's Brief Answering Receiver.

14. Acknowledgment of Service.

15. Trustee's Brief, Answering Receiver.

16. Trustee's Brief Replying to Bankrupt re: Exemptions.

17. Brief of Receiver of Vita-Pakt Associates, Inc., in Reply to Bankrupt's Answering Brief.

18. Reply of Receiver of Vita-Pakt Associates, Inc., to Trustee's Answering Brief.

19. Reporter's Transcript of Court's oral decision dated August 26, 1949.

19-a. Letter from Alex Wiley addressed to the Hon. Lloyd L. Black citing cases used in oral argument.

19-b. Proposed Findings of Fact and Conclusions of Law by Receiver (lodged).

19-c. Proposed Judgment, by Receiver (lodged).

20. Receiver's Motion to Tax Costs.

21. Notice of Presentation of Findings of Fact and Conclusions of Law and Judgment and Motion to Tax Costs, with copies of said proposed documents attached.

22. Objections of Bankrupt to Findings of Fact, Conclusions of Law, and Order proposed by Trustee and Receiver.

22-a. Proposed Findings of Fact and Conclusions of Law by Bankrupt (lodged).

22-b. Proposed Order on Petition for Review, by Bankrupt (lodged).

22-c. Trustee's Statement of Action Desired to be Taken by the Trustee.

22-d. Trustee's Statement of Objections as to Form of the Proposed Findings, Conclusions and Judgment of the Bankrupt and Receiver.

22-e. Trustee's proposed Findings of Fact and Conclusions of Law (lodged).

22-f. Trustee's proposed Order on Petition for Review (lodged).

23. Statement of "Costs of Sale."

24. Bankrupt's Additional Objections to Proposed Findings and Order.

25. Referee's Minutes of Special Meeting of Creditors; and Order Allowing Special Fee to Trustee's Attorney.

26. Bankrupt's Proposed Additional Findings of Fact.

27. Findings of Fact and Conclusions of Law signed and filed November 1, 1949.

28. Order on Petition to Review signed and filed November 1, 1949.

29. Bankrupt's Motion for New Trial.

30. Order Denying New Trial.

31. Bankrupt's Notice of Appeal filed January 10, 1950.

32. Bankrupt's Cost Bond on Appeal.

33. Copy of letter from Clerk of Court to Messrs. Johnson & Dafoe, attorneys for receiver, enclosing copy of Notice of Appeal.

34. Copy of letter from Clerk of Court to Messrs. Barker & Day, attorneys for trustee, enclosing copy of Notice of Appeal.

35. Bankrupt's Amended and Supplemental Notice of Appeal.

36. Copy of letter from Clerk of Court to Messrs. Johnson & Dafoe, attorneys for receiver, enclosing Amended and Supplemental Notice of Appeal.

37. Copy of letter from Clerk of Court to Messrs. Barker & Day, attorneys for trustee, enclosing copy of Amended and Supplemental Notice of Appeal.

38. Reporter's Transcript of Proceedings on August 24, 25 and 26, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 14th day of February, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ TRUMAN EGGER,
Chief Deputy.

[Endorsed]: No. 12481. United States Court of Appeals for the Ninth Circuit. Fay J. Hansen, Appellant, vs. Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, and R. C. Nicholson, Trustee of the Estate of Fay J. Hansen, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division. Filed February 17, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

In Bankruptcy No. 37835

In the Matter of

FAY J. HANSEN,

Bankrupt.

POINTS ON WHICH APPELLANT RELIES

Appellant hereby sets forth a statement of the points on which he intends to rely on the appeal of the above-entitled cause, to wit:

I.

The order of the Referee in Bankruptcy should have been affirmed by the District Court.

II.

The District Court had no jurisdiction to vacate the Referee's Order refusing to set aside allowance of exemptions.

III.

The trustee was estopped from attempting to deny bankrupt's claim to exemptions after same had been allowed.

IV.

The District Court had no jurisdiction to award any funds to the receiver.

V.

The receiver waived any claim he may have had to any specific property of bankrupt and elected to become a secured creditor.

VI.

The findings of Fact of the District Court are inconsistent, and do not warrant or support the Order appealed from.

VII.

Appellant admits that $5,897.00 used in the purchase of his house and car came from the bank account of Vita-Pakt Associates, but claims that said funds belonged to him.

VIII.

The following Findings of Fact of the District Court are clearly erroneous:

1. That the monies received from the sale of the capital stock of the corporation were property of the corporation.

2. That the sum of about $16,000.00 withdrawn by bankrupt from the corporation bank account was the property of the corporation, and was appropriated for bankrupt's personal use.

3. That the transfers of bankrupt to the corporation were made voluntarily, and were not secured by threats or coercion.

4. That said transfers were not made at the request of the corporation or its representatives (though appellant admits said transfers were obtained by agents of a group of stockholders who were not authorized to act by any formal authority of the corporation).

5. That said transfers were not given for security.

6. That the Referee reconsidered and reexamined the merits of his original order of October 20, 1948, before denying trustee's petition to set aside such order approving allowance of exemptions.

IX.

The District Court was not warranted in calling witnesses, hearing some of the evidence on some of the issues, and picking and choosing bits of evidence in order to reverse the order of the Referee.

/s/ ALEX WILEY,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 17, 1950.

In the United States District Court for the Western District of Washington, Northern Division

In Bankruptcy No. 37835

In the Matter of

FAY J. HANSEN,

Bankrupt.

ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL.

This matter having come on for hearing without notice, in open court, on February 20, 1950, upon the oral motion of R. C. Nicholson, Trustee of the above-entitled estate, made through his counsel, William J. Walsh, Jr., for an order extending the time for filing the record on appeal and docketing the appeal; and no other party to this proceeding appearing; and it appearing from the record and files herein that an amended and supplemental notice of appeal was filed by the bankrupt-appellant herein on January 14, 1950, and that this order is made before the expiration of the period for filing and docketing an appeal as originally prescribed in Federal Rule of Civil Procedure 73g; and good cause appearing therefor, it is

Ordered that the time for filing the record on appeal and docketing the appeal in the Court of

Appeals of the Ninth Circuit is hereby extended to and including March 27, 1950.

Done in Open Court this 21st day of February, 1950.

Presented by:

LLOYD L. BLACK,
Judge.

WILLIAM J. WALSH, JR.,
Attorney for Trustee-
Appellee.

[Endorsed]: Filed February 23, 1950.

No. 12481

In the United States Court of Appeals for the Ninth Circuit

FAY J. HANSEN, Appellant

v.

ERNEST A. JONSON, Receiver of Vita Pakt Associates, Inc., an Insolvent Corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, Bankrupt, Appellee.

OPENING BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

ALEXANDER WILEY,
Attorney for Appellant

Office and P. O. Address:
617 New World Life Building,
Seattle 4, Washington.

No. 12481

In the United States Court of Appeals for the Ninth Circuit

FAY J. HANSEN, Appellant

v.

ERNEST A. JONSON, Receiver of Vita Pakt Associates, Inc., an Insolvent Corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, Bankrupt, Appellee.

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ALEXANDER WILEY,
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v.

ERNEST A. JONSON, Receiver of Vita Pakt Associates, Inc., an Insolvent Corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, Bankrupt, Appellee.

OPENING BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

STATEMENT SHOWING JURISDICTION

Sec. 2(7) of the U. S. Bankruptcy Act (11 U.S.C.A., Sec. 11(7) confers upon courts of bankruptcy the power to determine controversies in relation to the estates of bankrupts.

Sec. 2(10) of said Act gives to the district judges power to review matters certified to said courts by referees.

Sec. 2(11) of said Act invests said courts of bank-

ruptcy with jurisdiction to determine all claims of bankrupts to their exemptions.

Sec. 24 of the U. S. Bankruptcy Act (11 U.S.C.A., Sec. 47) vests in the United States Courts of Appeal appellate jurisdiction from the courts of bankruptcy in proceedings in bankruptcy and controversies arising in proceedings in bankruptcy.

Bankrupt filed his petition with the referee for the issuance of an order directed to the trustee and the receiver of Vita-Pakt Associates, Inc., to show cause why transfers made by bankrupt of all his property within one week prior to his adjudication should not be adjudged void. All the property in controversy before the referee, district judge and this court was in the possession of the bankrupt at the time of his adjudication in bankruptcy, and since said time remained in the possession of the trustee in bankruptcy until same was sold by the trustee.

The trustee joined the bankrupt in alleging said transfers were void and fraudulent and should be set aside. The referee set aside said transfers, adjudged them void, and awarded to bankrupt his statutory exemptions out of the proceeds of the sale of said assets. The district court reversed the referee's order and denied bankrupt all exemptions claimed.

This case unquestionably involves a controversy arising in proceedings in bankruptcy.

STATEMENT OF THE CASE

Fay Hansen, appellant herein, and Paul Schafer were copartners engaged in processing and selling orange juice. Schafer surrendered his interests to Hansen. Hansen incorporated Vita-Pakt Associates, Inc., and subscribed for 530 shares of stock therein in return for the transfer to the corporation of all assets of the partnership, subject to its liabilities. Hansen and his wife were directors of said corporation. Hansen sold 519 shares of stock in said corporation for $51,900.00 and gave away 96 shares of stock. Said sum was deposited in the bank account of the corporation. Only one share of stock was actually issued to Hansen, as it was the intention of Hansen to take care of the bookkeeping details of the issuance and transfer of the stock at some later date. The corporation allotted 530 shares of stock to Hansen, and 260 shares were allotted for the purposes of sale by the corporation. Hansen used $5,897.00 of the money in the bank account of the corporation in the belief that such funds constituted proceeds of the sale of his own stock. Some $10,000.00 of said funds were used by Hansen to pay debts of the partnership, and the money owing to Schafer for his interest in the partnership. The stockholders of the corporation employed an accountant and attorney, who accused Hansen of misappropriating corporation funds and of selling stock without a permit from the state and thus committing a crime. They insisted that he turn over to the

corporation all the property of every kind which he possessed, and told him if he did this the stockholders would feel more kindly toward him and would not be apt to prosecute him. To avoid criminal prosecution he and his wife transferred to the corporation all the property of every kind which they owned. One week thereafter Hansen was adjudicated bankrupt on his voluntary petition on August 5, 1948. In his schedules in bankruptcy he recited that he had within a week prior thereto signed transfers of all the property he owned—consisting of an equity in his home, an automobile, his household furniture and a vacant lot—to Vita-Pakt Associates, Inc.; that such transfers had been obtained from him by extortion and duress and threats of criminal prosecution, and were void.

On August 31, 1948, the trustee signed and filed his report on exemptions in which he allowed to bankrupt the exemptions claimed, to-wit: $4,000.00 interest in his home as homestead exemption; $500.00 interest in household furniture; and $250.00 lieu exemption, as provided by the statutes of the State of Washington, in his equity in his automobile. No exceptions to said report on exemptions having been filed within ten days, as required by General Order No. 17(2) in Bankruptcy, on October 20, 1948, at the trustee's request the referee in bankruptcy entered an order approving said report on exemptions.

Thereafter Hansen petitioned the referee in bank-

ruptcy to issue an order citing into court the trustee in bankruptcy and the receiver of Vita-Pakt Associates, Inc., to show cause why such transfers should not be adjudged void. The trustee joined in bankrupt's petition. The receiver denied said transfers were void, and claimed an equitable lien upon the property transferred; and alleged that the property transferred had been paid for in part with funds belonging to said corporation. After several days of trial on the issues above set forth the referee in bankruptcy entered an order adjudging said transfers made by bankrupt to be void. Both the trustee and receiver filed petitions for review of said order.

After the referee had given his memorandum decision, but before said order was entered, the trustee in open court orally, and without submitting any written petition therefor, requested the referee to set aside his previous order approving trustee's report on exemptions, and disallow said exemptions. The referee orally announced his denial of said petition.

After the entering of said order by the referee, and after petitions for review of same had been filed, at the request of the trustee the referee entered a supplemental order denying trustee's petition to set aside the Order Approving Trustee's Report of Exemptions.

No petition for the review of said supplemental order has ever been filed by anyone.

The district court reversed the order of the referee

and disallowed bankrupt's claim of exemptions.

From that judgment of the district court this appeal is taken.

SPECIFICATIONS OF ERROR

I. The district court erred in reversing the order of the referee and disallowing to bankrupt his exemptions.

II. The district court erred in awarding any funds to the receiver.

III. The district court erred in its finding of fact that all moneys received from the sale of corporation stock was the property of the corporation, and that Hansen had misappropriated any funds belonging to the corporation.

IV. The district court erred in finding that Hansen had voluntarily made the transfers of property to the corporation, and said transfers were not secured by threats of criminal prosecution.

V. The district court erred in finding that said transfers were not made as security, and did not constitute a general assignment for creditors.

VI. The district court erred in concluding that the sum of $5,897.00 constituted a first and prior lien against proceeds of the sale of bankrupt's property.

VII. The district court erred in concluding that the referee should have vacated the order approving

allowance of bankrupt's exemptions and in disallowing said exemptions.

The question involved in this appeal is the same question before the District Court: Was the referee's order clearly erroneous?

The questions involved in this appeal are the same questions which were before the district court on the hearing of the petitions for review of the order of the referee in bankruptcy; and appellant believes this court should affirm the order of the referee unless it is clearly erroneous.

We quote from the opinion in the case of *Morris Plan Industrial Bank v. Henderson,* 2 Cir., 131 F. 2d 975, 977:

> "We therefore hold that the question is the same in this court as it was in the district court."

In the case of *Smith v. Federal Land Bank of Berkeley,* 9 Cir., 150 F. 2d 318, 321, the court states:

> "We think under these rules we should examine findings of both the district court and conciliation commissioner for clear error only, on an appeal such as the instant one from a judgment of the district court setting aside an order of the conciliation commissioner."

The court in the case of *Mergenthaler v. Dailey,* 2 Cir., 136 F. 2d 182, 184, par. (2), stated clearly:

> **"We have the same duty as the district court to accept the referee's findings unless they are clearly erroneous."**

We cite from the opinion in *Phillips v. Baker,* 5 Cir. 165 F. 2d 578, 581, par. (1):

> "Before proceeding to deal with the separate classes of appeals, a word or two of general application will be in order. The first and most important is that in dealing with the questions presented for our decision, we are not dealing with the ordinary situation of an appeal from findings of fact of a district judge, which under rule 52(a), Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c 'shall not be set aside unless clearly erroneous.' We are, on the contrary, dealing with findings made by the district judge, adverse to those of the referee, in respect to matters primarily remitted for decision to the referee and as to which it is provided that 'the judge shall accept his findings of fact unless clearly erroneous.' *Under that rule 'we have the same duty as the district court to accept the referee's findings, unless they are clearly erroneous.'* Under that rule we, of course, take into consideration the fact that the district judge has refused to accept the referee's findings. But we do so not in determining whether the district judge's findings are clearly erroneous. for that is not the matter before us. We do it in determining whether the referee's findings are, and we do this with the clearest recognition that the duty to determine whether the referee's findings 'must be accepted' and whether the district judge has erred in not accepting them is not the district judge's but ours." (Italics ours)

I

District Court Erred in Reversing the Order of the Referee and in Disallowing Bankrupt's Exemptions

1. Introduction:

We know of no more appropriate introduction descriptive of the nature of these proceedings than to quote from the decision of the district judge, District Court of Georgia, in the case of *In re Talbot,* 116 Fed. 417, in which he held that a bankrupt might claim his exemptions allowed by the laws of Georgia from the proceeds of property which he had assigned for the benefit of creditors, after such property had been recovered by his trustee:

> "This is a very strenuous effort to defeat the application of the bankrupt for homestead, BUT IT IS BASED UPON A CARDINAL MISCONCEPTION OF THE DUTY OF THE COURT IN SETTING ASIDE SUCH EXEMPTIONS. The misconception is that the bankruptcy law and homestead law of the state both relating to exemptions are construed by counsel for objectors with the utmost strictness and narrowness, WHEREAS, A FUNDAMENTAL PRINCIPLE WITH REGARD TO JUDICIAL DETERMINATIONS OF APPLICATIONS FOR EXEMPTIONS IS THAT THEY SHALL BE CONSTRUED WITH ALL THE LIBERALITY PROPER AND POSSIBLE UNDER THE CIRCUMSTANCES."

In the very court from which this appeal is taken,

in the case of *In re McFarland,* 49 Fed. 2d, 342, 343, Judge Neterer said:

> "The administration of bankruptcy laws must be liberally construed, and not by strict interpretation deprive the unfortunate of the benefits permitted by wise and humane public policy."

The Supreme Court of the State of Washington in the case of *In re Poli's Estate,* 27 Wash. 2d, 670, 674, 179 P. 2d 704, 706, stated:

> "We have consistently held that 'Homestead and exemption laws are favored in the law and are to be liberally construed'."

In the case of *Hills v. Joseph,* 9 Cir., 229 Fed. 865, 869, this court declared:

> "The rule of construction applicable to exemption statutes is the most liberal known to the law. As said in 18 Cyc. at page 1380:
>
> 'By all but universal rule the statutes which create or give the right of exemption to a debtor are held subject to the rule of liberal construction. Indeed it would be more proper to say that they are generally SUBJECT TO THE MOST LIBERAL CONSTRUCTION WHICH THE COURTS CAN POSSIBLY GIVE THEM, the courts taking the ground that since the statutes have a beneficial object, their first duty is to see that this object is accomplished'."

In 1 Collier on Bankruptcy, 14 Ed., at page 796, it is stated:

> "As we have seen, it has long been the policy

> of Congress to give effect to state exemption laws. These exemption laws reflect the interest of the state in protecting its citizens from pauperism and securing to them some means of subsistence even in times of financial difficulty. In accordance with this philosophy, *it is therefore well settled that the provisions of the bankruptcy act and state laws in regard to exemptions should receive a liberal, rather than a narrow or technical construction.*"

In the case of *Smith v. Thompson,* 8 Cir., 213 Fed. 335, 336, Judge Hook said:

> "In every court the administration of an exemption law should comport with the beneficent spirit that prompted its enactment. A court of equity especially should not attempt to defeat the exemption by niceties in practice. It should be helpful to those whose condition requires them to invoke it."

With this background for our argument, we respectfully request the court to reverse the judgment of the district court, and affirm the judgment of the referee by allowing to the bankrupt the exemptions provided by the laws of the State of Washington and the National Bankruptcy Act.

2. The Referee's Findings of Fact should have been accepted by the District Judge.

We cite from No. 47 of General Orders in Bankruptcy adopted by the Supreme Court of the United States (11 U.S.C.A. foll. Sec. 53):

> "Unless otherwise directed in the order of

> reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous."

A most cursory examination of the opinion of the district court (Tr. 257) makes it apparent that the said court entirely mistook his province and his duty to affirm the referee unless the referee's order was clearly erroneous. Nowhere in said opinion does the court even venture the statement that any specific findings of fact made by the referee is erroneous in any particular. He merely states that "My conclusions are quite opposite to the conclusions of the referee."

Characteristic of many similar decisions is the holding in the case of *Equitable Life Assurance Society v. Deutschle,* 8 Cir., 132 F. 2d 525. We quote from p. 526, par. 1:

> "It is settled by numerous authorities that when the findings of a reference in bankruptcy are supported by substantial evidence they are not 'clearly erroneous' within the meaning of General Order 47, 11 U.S.C.A. following section 53, and that they will not be disturbed on appeal."

In the Conclusions of Law of the district court (Tr. 71) the court does not point out any specific finding of fact of the referee as being clearly erroneous, but concludes that the findings of fact of the referee "to the extent that the same are inconsistent with the findings

of fact hereinabove made, are not supported by the evidence and are clearly erroneous." Such a general conclusion of law exhibits an intent on the part of the court to arrive at his own conclusions upon the record of the proceedings before the referee, and upon superficial examination of some of the witnesses on some of the facts involved, even though every finding of fact made by the referee is amply supported by the evidence. We believe such practice is contrary to the requirements of General Order in Bankruptcy No. 47.

3. On the merits of the controversy bankrupt is entitled to the exemptions allowed to him by the Referee in Bankruptcy.

A. No party to these proceedings has ever disputed the fact that the exemptions allowed to bankrupt by the referee are in extent and amount those fixed by the general exemption laws of the State of Washington.

B. The district judge in his oral decision (Tr. 257) passes lightly over the rights of exemption given to impoverished debtors by the laws of the State of Washington, which rights are generally so jealously guarded by all courts. He states bankrupt obtained $4,500.00 by deceit, which sum went into the purchase of bankrupt's home; and says that "It is difficult for me to understand that justice, equity or law could be in accord with his keeping the fruits of such fraud." For the sake of argument, if we admit that the district court

was correct in its statement above cited, still the court completely ignored the fact that $3,000.00 of the amount of the purchase price of said home was loaned to bankrupt by his uncle, about which fact there is no dispute whatever (Tr. 129). Said court also ignored the fact that about $2,000.00 of the money which was expended by bankrupt on household furniture was loaned to him by his mother; and the equity of bankrupt in his home to the extent of $3,000.00 and in his furniture to the extent of $2,000.00 could not under any circumstances be considered tainted by any fraud of any kind. Also, we wish to point out that the fraud of which bankrupt is accused, making misrepresentations in the sale of corporation stock, has never by any court heretofore been considered proper ground for denying the right of exemptions allowed by law.

It will be noted that the trustee's allowance to bankrupt of exempt property included wearing apparel of the estimated value of $300.00 (Tr. 8). It will further be noted that the district court disallowed the bankrupt's exemptions in toto (Tr. 69, par. XX). *Unless this court reverses the judgment of the district court we will have the situation in which the trustee is entitled literally to the "shirt off the back" of the bankrupt.*

C. The only claim made by the trustee that bankrupt was not entitled to his statutory exemptions is based upon the proviso in Sec. 6 of the Chandler Act (11

U.S.C.A. Sec. 24):

> "Provided, however, that no such allowance of exemptions shall be made out of the property which a bankrupt transferred or concealed and which is recovered, or the transfer of which is avoided under this Act for the benefit of the estate, except that where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess."

It seems to appellant that such proviso does not operate in any way to disallow to bankrupt his statutory exemptions for the following reasons:

First: The transfers of bankrupt's property to the corporation were obtained by duress, and were void and never conveyed any rights to said corporation. (This question will be further discussed under Point VII.)

If said transfers were induced by threats of criminal prosecution and duress, and were unlawfully extorted from bankrupt, such paper transfers did not in fact convey any interest of any kind in said property to said corporation. and did not transfer from bankrupt any rights, either exemption or other rights, in said property. There being no valid transfer of interest in said property, such provision in Sec. 6 of the Chandler Act has no application. We cite the case of *Negin v. Solomon,* 2 Cir., 151 Fed. 2d 112, 114:

> "There is equally little substance in the plaintiff's argument that because the bankrupt re-

> tained power to change his wife as beneficiary, the fund ceased to be exempt. . . . *As well might one argue that if a bankrupt makes a void deed of the homestead to someone outside the family, it ceases to be exempt.*"

Second: Said provision in Section 6 of Bankruptcy Act has no application to facts in this case.

It was the intent of Congress in the enactment of the proviso in question to prevent a bankrupt from claiming exemption in property which he had transferred or concealed with intent to deprive his creditors of their just rights. Here there certainly could not be any such motive on the part of Hansen or any desire to favor the corporation by such transfers. The transfers were coerced from him. I have found no case in which any court (except the district court from which this appeal is taken) has ever denied a bankrupt his exemptions in property transferred because of said proviso, except in cases where the bankrupt has been guilty of attempting to prevent the trustee in bankruptcy from obtaining property to which he was entitled.

Here there was no wrongdoing on the part of bankrupt in executing the transfers; he executed them under compulsion. He was not trying to place his property beyond the reach of his creditors. As soon as he obtained legal advice he filed his petition in bankruptcy for the very purpose of setting aside such transfers, so that all his creditors could share equally

in the property so transferred. It was the bankrupt, not the trustee, who instituted these proceedings to set aside such transfers (Tr. 9-12), and caused to be cited into court the trustee, as well as the receiver, to show cause why such transfers should not be voided.

Third: The nature of such transfers if valid was similar to an assignment for the benefit of creditors.

In the case of *Pilson v. Rodeffer,* 4 Cir., 61 Fed. 2d 976, the court held that when a debtor, being insolvent, conveys all his property to a third party to pay one or more of his creditors to the exclusion of others, such a conveyance will be construed to be an assignment for the benefit of creditors.

Collier, 14th Ed., Vol. 1, p. 842, states:

> "It was the accepted rule prior to 1938 that where a general assignment for the benefit of creditors had been nullified by the subsequent bankruptcy of the assignor within four months of the assignment, the bankrupt might claim his exemptions in the property assigned. . . ."
>
> p. 843: "A reasonable construction of the proviso of par. 6 which has already been discussed would warrant the conclusion that the rule should still prevail, although the language of the proviso is admittedly broad."
>
> p. 844: "It seems only reasonable that a distinction should be made between a bankrupt who has transferred his property for the benefit of his general creditors, which is in a way merely a voluntary application of the bankruptcy theory, and a bankrupt who attempts to con-

> ceal or transfer his property beyond the reach of his creditors or prefer one or more creditors over others. It is not equitable to deprive the bankrupt of his exemptions merely because he had attempted to distribute his property equally among his creditors. . . . In addition to the foregoing, any argument that the trustee should not lose the fruits of his labor is fallacious when applied to the case of the general assignment. . . . Furthermore, under the new and broad jurisdictional provisions of par. 2a (21), the trustee may easily obtain possession and an accounting of the assigned property where the general assignment is supervened by bankruptcy proceedings, and the *propriety of allowing an bankrupt to profit at the expense of a trustee's efforts and labor is, therefore, hardly presented if at all.*"

We believe that the propriety of allowing a bankrupt to profit at the expense of the trustee's efforts is hardly presented at all in the case at bar. It is rather the trustee who is profiting by the bankrupt's efforts. The bankrupt embarked upon an effort to set aside the transfers, and the trustee belatedly joined him. The reason for the rule depriving a bankrupt of his exemptions not being present in this case, the rule itself cannot apply.

Fourth: Section 6 of Bankruptcy Act provides bankrupt may have his exemptions out of property conveyed where transfer made by way of security.

We quote from the last part of Sec. 6:

> "except that, where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such (exemption) allowance may be made out of such excess."

The referee found, concluded and decided that the corporation took these conveyances *as security* at a time when it knew Hansen to be insolvent (Tr. 30).

I cite from the referee's Findings of Fact:

> "That Vita-Pakt Associates, Inc., took said conveyances from Hansen and wife *as security.*" (Tr. 42, par. XI)
>
> "The corporation, possessed of these facts, then and there made an election to take the position of a creditor and secure itself by these conveyances." (Tr. 43, par. XIII)

Ernest Jonson, the receiver, testified as follows: (Tr. 141-2)

> "Q. When you say that, you are speaking of the $16,000.00 that he had withdrawn from the corporation?
>
> A. That's right.
>
> Q. And you considered that he owed that to the corporation?
>
> A. Yes."

And Mr. Carney testified that he told Hansen that he had withdrawn about $16,000.00 from the corporation without authority (Tr. 192).

From these facts: That the corporation claimed that

Hansen owed it about $16,000.00, and exacted from Hansen the conveyances in question without in any manner satisfying or cancelling any alleged claim it had against him—for there is no word of testimony of any kind that that was done—the referee properly held that the conveyances were given as security; and there is no word of testimony in the record to warrant or support the finding of the district court that such transfers were not given as security.

Thus, under the specific provisions of such proviso in Sec. 6 of the Bankruptcy Act, the allowance of exemptions may be made out of the excess of the amount secured by such transfers.

Now, the question arises, what is the excess out of which the bankrupt may claim his exemptions? We contend that Hansen did not owe the corporation any amount at all, and that the entire amount of property conveyed constituted the excess of the amount secured, and that Hansen could claim as exempt any of the property transferred. This point will be fully discussed under Point No. VI herein.

Fifth: Said proviso in Section 6 of the Bankruptcy Act is wholly inapplicable because it refers to property "recovered or the transfer of which is avoided under this act for the benefit of the estate."

In the case at bar the property was never recovered because it at all times remained in the possession of the bankrupt until possession was surrendered by him to the trustee; and the paper transfer of said prop-

erty was never avoided for the benefit of the estate, but it was avoided on the petition of the bankrupt and for his benefit, and allowed to the bankrupt as exempt by the referee.

Sixth: Bankruptcy Court should follow decisions of State Court in allowing exemptions.

I quote from Vol. 1, Collier on Bankruptcy, 14th Ed., p. 796-7:

> "It is also well established that in determining the right to exemptions allowed by the states, the state law, as interpreted by the highest judicial tribunal of the state, is controlling, and the decisions of a state court as to whether or not a particular statute is an exemption statute are binding on the bankruptcy court."

We believe the holding of the Supreme Court of the State of Washington in the recent case of *Van Slyke v. Baumgarner,* 177 Wash. 326, 329, 31 P.(2d) 1014, 1015, should be controlling on the question of exemptions in this case.

The facts in that case were: Baumgarner and wife were residing on certain real property. The house was destroyed by fire, and they gave to Van Slyke an assignment of some $2,300.00 of the proceeds of the insurance on said property. Within four months thereafter Baumgarner was adjudicated bankrupt, and claimed as exempt the proceeds of said insurance to the extent of their homestead rights in the real property and exemption rights in the personal property.

By stipulation of the parties the proceeds of the insurance policy were paid to the trustee in bankruptcy without prejudice to the rights of the claimants thereto. The assignee respondent claimed that his assignment did not in law vest in him the legal title to any specific portion of the fund, but created an equitable lien upon the whole; and that he was entitled to payment out of that part of the fund set aside to the bankrupt as exempt. The court declared:

> "We cannot agree with respondent's position, and do not think the authorities cited, general in their application, support his position, under the particular circumstances of this case. Exemption laws are humane in their purpose, and are to be liberally construed in favor of debtors. . . .
>
> "The assignment made by appellants cannot fairly be construed as the pledging of the whole fund to secure payment of respondent's claim. Neither would it be a waiver of their right to claim an exemption, if the right could be waived. The assignment was made before the bankruptcy proceedings, and when appellants had due them from the insurance company over $8,800.00. The bankruptcy proceedings had not then been instituted, and appellants' claim to exemption had not been made. We have not here a case where, after the exemption claim has been made and exempt property set aside and identified, an assignment or charge against it is made. The assignment taken by respondent, in so far as

> the rights of the other creditors were concerned, was an illegal preference, and if no act of the appellants had intervened to stop payment, and the insurance company had paid the money to respondent, he would have been required to turn it over to the trustee, *and appellants would still have their right to their exemptions.* He cannot have a greater right, under the circumstances as they later developed, than he would have had if his claim had been paid by the insurance company. . . .
>
> "They had a right to file the (bankruptcy) petition. Like the exemption laws, the bankruptcy law, while perhaps often abused, is beneficent in its purpose, and when debtors are driven to the wall, it cannot be imputed to them as a wrong that they resort to this means for relief and the opportunity to make a new start in life. . . .
>
> *"Respondent comes into court seeking equitable relief. A court will be slow to grant this relief at the expense of rights secured to appellants by the exemption laws of this state."*

The court then allowed the bankrupt to claim his exemptions out of the proceeds of the insurance policy in spite of the assignment which he had made of its proceeds.

In the case of *In re Dudley* (D.C. Calif.), 72 Fed. Supp. 943, the bankrupt had shortly before his bankruptcy purchased certain property classified by the laws of California as exempt, and Judge Yankwich

allowed him his exemption in said property, stating at p. 946:

> "And where the exemption by state law is absolute and without any limitation as to time, or other restrictive conditions, the bankruptcy court, *bound as it is to follow it,* will apply the same rule, *regardless of any provisions in the bankruptcy law relating to preferences.*"

This decision was affirmed by this court in 166 Fed. 2d 1023, 9 Cir., in the following brief decision:

> *Per Curiam*: "On the grounds and for the reasons stated in its opinion (72 Fed. Supp. 943), the judgment of the district court is affirmed."

The above case illustrates the rule that bankruptcy courts will follow the state laws, and the decisions of the state courts, in allowing the exemptions given by state laws.

The attitude of this court on the allowance of exemptions is clearly indicated in the recent case of *Turnbeaugh v. Santos,* 9 Cir., 146 F. 2d 168, 169. We quote from Judge Denman's opinion:

> "The hearing was conducted by the referee with a complete misapprehension of one of the underlying principles of the homestead law, and one of the findings in a substantial aspect is grossly unfair to appellants. Under the protests of appellants' attorney, appellants were subjected to a gruelling cross-examination as to the husband's past debts existing at the time the wife made the homestead declaration on the

theory that a homestead declarant is acting in fraud of creditors in seeking to establish a homestead. To the contrary, the very purpose of the homestead law is to afford a residence to debtors, which is free from their debts. . . . A homestead is not invalid because the declarant is in debt or declared the homestead to protect it from existing debts. This is the very purpose of the Homestead Laws."

II

The District Court Had No Jurisdiction To Vacate the Referee's Order Approving the Allowance of Bankrupt's Exemptions.

1. The order approving trustee's report on exemptions was *res judicata.*

The Order Approving Trustee's Report on exemptions was filed on October 20, 1948 (Tr. 8). The trustee himself granted to the bankrupt the exemptions claimed by him, and at the specific request of the trustee the referee approved the allowance of said exemptions, after the trustee's report had been on file more than the required ten-day period and no objections had been made thereto. **No petition has ever been filed by anyone to review the order allowing said exemptions.** The time within which any interested party might object to the Trustee's Report on Exemptions was limited to ten days from the date of its filing.

General Order No. 17 in Bankruptcy, as adopted by the Supreme Court of the United States (11 U.S.C.A.

foll. Sec. 53) provides:

> "The trustee shall make report to the court within five days after receiving the notice of his appointment, unless further time is granted by the court, of the articles set off to the bankrupt or debtor by him, according to the provisions of section 47 of the Act, with the estimated value of each article; and any creditor or the bankrupt or debtor may file objections to the determination of the trustee within ten days after the filing of the report, unless further time is granted by the court."

In the case of *In re Krecum,* 7 Cir., 229 F. 711, the court held that the rule that exceptions must be filed to the trustee's report setting aside exempt property within twenty days (the rules in force at that time provided 20 instead of 10 days) is mandatory; and the district court had no discretion and could not permit the filing of objections 21 days after the filing of the report. *If the district court could not even permit filing objections to the report, it must necessarily follow that the district court could not set aside such order without objections being filed.*

In the case of *In re Rabb,* D.C. Tex., 21 F. 2d 254, 256, the court said:

> "General Order 17 of the Supreme Court relating to this matter is mandatory."

In the case of *United States v. Bernstein,* 8 Cir., 16 F. 2d, 233, 236, the trustee had on February 26, 1925, set off to the bankrupt in lieu of homestead the sum

of $500.00. On June 22, 1925, the United States filed exceptions to said report and claimed that the money set off to the bankrupt was not exempt as to the government.

After some discussion of the question as to whether or not the government had to file a claim in bankruptcy, the court stated:

> "It thus appears that whatever its obligation in law may have been, the petitioner submitted to the jurisdiction of the Bankruptcy Court as a litigant under the provision of General Order 17, and subject to the procedure therein prescribed. Its application came too late under the express provisions of the very general order to which it appealed. We may not depart from the procedure laid down by the Supreme Court of which the petitioner has sought voluntarily to avail itself. *The conclusion is irresistible that the report of the referee on this matter of exemption* WAS NO LONGER OPEN TO ATTACK."

The order of the referee allowing exemptions to Hansen had become an order of the district court. In the case of *In re Tinkoff,* 7 Cir., 85 F. 2d 305, Cert. denied, 299 U. S. 609-11, 81 L. Ed. 450, at page 307, the court said:

> "Under the Bankruptcy Act (11 U.S.C.A. sec. 1 *et seq.*) a referee is a quasi-judicial officer who gives judgment or final order upon matters properly submitted to him, subject to review by the district court on the petition of an interested

party. *Adjudications of the referee, if not reviewed within the time and in the manner prescribed. have the force and effect of judgments and orders of the district court.*"

In the case at bar the district court held that the referee should have vacated his Order Approving the Trustee's Report on Exemptions (Tr. 74, par. V). But this court has definitely and clearly held that the referee had no power to set aside such order. When the referee had no power to set aside his order, and when no petition to review said order has ever been filed, then the decision of the district court setting aside such order must be clearly erroneous.

In the case of *In re Faerstein,* 9 Cir., 58 F. 2d 942, the referee had set aside his former order. This court, at page 943, stated:

> "The issue concisely is, Did the referee have the power, after having made and entered formal findings and conclusions, and after the 'turnover order' was issued, to set the same aside, or was the exclusive power vested by law and rule in the United States District Judge to review such order?"

Judge Neterer, then district judge of the court from which this appeal is taken, sitting as a member of this court, stated at page 943 of said opinion:

> "When an order is entered, the referee's power over the order is ended. The remedy is exclusive, and he may not review or change the

order. . .

"That the procedure of review is plainly defined and power limited in the interest of regularity and for the common good is clearly stated by Judge Sawtelle of this court, sitting as district judge, *In re Octave Mining Company,* (D.C.) 212 F. 457, 458, as follows:

'It is manifest that the mode prescribed by General Order 27 is the only manner in which the decisions of the referee may be reviewed.' "

The above case (*In re Faerstein*) was cited and followed by this court in the case of *Grande v. Arizona Wax Paper Company,* 9 Cir., 90 F. 2d 801. In that case no petition for review of the order of a referee was filed within the ten days set by court rule. Petitioner then applied to the district court for an extension of the time within which to file a petition for review. The district court refused to allow any extension of time. This court said at page 805:

"The order of February 18, 1931, allowing these claims has become final. *The referee himself could not set it aside.* (Citing *In re Faerstein* and other cases) In order to attack this allowance it was necessary that a petition for review be filed in the district court within ten days. This was not done, and no appeal to this court lies from the order of the referee except by way of petition to review and an appeal from the order of the district court on the petition."

2. No petition has ever been filed by anyone for the review of the supplemental order of the referee entered on February 11, 1949.

No complaint of any kind was made by the trustee as to the Order Approving Allowance of Exemptions until after the referee had rendered his Memorandum Decision (Tr. 23), over two months after said order had been entered. While the attorneys for the receiver, the trustee and the bankrupt were present in court for the settling of the findings, for the first time the trustee requested the referee to set aside such order. The trustee, apparently conceding that he had no valid grounds upon which to make such request, did not even submit any petition in writing. After the filing of the petitions for review of the referee's order of January 17, 1949, the trustee proposed and the referee signed a Supplemental Order (Tr. 46) denying the trustee's petition to set aside said order approving allowance of exemptions. No petition has ever been filed for the review of said order refusing to set aside the order allowing exemptions.

3. The order approving trustee's report on exemptions was and is *res judicata*, and beyond the power of the District Court to set aside, because:

First: No objection was made to the trustee's report on exemptions within the time allowed by General Order in Bankruptcy No. 17, or at any time thereafter.

Second: No petition to review the Order Approving Trustee's Report on Exemptions has ever been filed.

Third: No petition to review the Supplemental Order refusing to set aside said order allowing exemp-

tions has ever been filed.

Vol. 2, Collier on Bankruptcy, 14th Ed., p. 1488, states:

> "Unless a petition for review is filed with the referee, the district court has no authority to review the action of the referee."

In the case of *In re Madonia,* D.C. Ill., 32 F. Supp. 165, at page 166 the court says:

> "I am of the opinion that the court had discretion within reasonable limits to grant the extension after the expiration of the ten-day period.
>
> "Further, I am of the opinion that the service of the copy is not necessary to give the judge jurisdiction of such matter. *The filing of the petition with the referee is,* but the service of the copy is for the purpose solely of giving notice to the other party that the matter is being taken from the referee to the judge."

In the case of *In re Avoca Silk Company,* D.C. Pa., 241 Fed. 607, 608, the court states:

> "The required petition becomes the foundation of authority and cannot be dispensed with in proceedings to review. When filed the referee is bound to certify; *without it there is no authority to review.*"

Remington on Bankruptcy, 4th Ed., Vol. 2, p. 96, par. 621-654:

> "If a referee has entered an order in a reference made to him and the time for review has

passed, that order is as final and is as much an order of the court as if it had been entered by a judge. A judge cannot disregard it arbitrarily, as seems to be suggested in some of the quotations."

In the case of *In re Realty Foundation Inc.*, 2 Cir., 75 F. 2d 286, the court squarely held that the district judge had power only to review the decision of the referee upon the petition taken by someone having the legal right to ask for the review. We cite from the opinion at page 288, written by Judge Augustus N. Hand:

> "Appellee further seeks to sustain the court below on the novel theory that the latter had disposed of the appeal in accordance with a sound discretion. The difficulty with this is that in confirming the sale the referee acted as a judge of the bankruptcy court with power to hear and determine the matter before him, and *the district judge had no power whatever to make orders in the general interest of the creditors, but stood only in the position of an appellate judge who might review the decision of the referee upon a petition taken by someone having a legal interest in the premises.* In our opinion, Certified Associates Inc. had no such interest and could not properly either object to the confirmation of the saleor review the order of confirmation.
>
> "The order of the district court is reversed and the proceeding remanded, with direction to dismiss the petition of Certified Associates Inc.,

to review the order of the referee, and to affirm the latter's order."

The United State Supreme Court in *Bernards v. Johnson,* 314 U. S. 19, 86 L. Ed. 11, in affirming a judgment of this court, 103 F. 2d 567, squarely held that orders of a conciliation commissioner (whose powers are similar to those of a referee in bankruptcy), when no review is sought within the time specified by law, are impregnable to subsequent attack.

This is a long and complicated case, in which litigants attempted to have set aside orders of the conciliation commissioner in cases in which no review was sought within the time limited by law. On page 19, par. 2, the court says:

> **"Assuming the challenged orders of the commissioner and the court were erroneous, were they final, binding and impregnable to subsequent attack, since review or appeal was not sought or taken within the time limited by court rule or law? WE HOLD THAT THEY WERE."**

4. The receiver also is bound by the order allowing bankrupt's exemptions.

In his schedules in bankruptcy Hansen alleged the transfers of his property to the corporation were void because of duress and lack of consideration; and tendered that issue; and claimed statutory exemption in the property so transferred. The corporation was listed

as a creditor whose claim was disputed; the attorneys for the receiver appeared at the first meeting of creditors and cross-examined bankrupt at length. The trustee's report allowing the exemptions was on file for more than the ten-day period fixed by the General Orders in Bankruptcy, before the referee entered his order approving such allowance.

The receiver is bound as absolutely by said order allowing exemptions as was the creditor in the case of *Smalley v. Langenour,* 30 Wash. 307, 70 P. 786. In said case a creditor levied execution on the real property of a judgment debtor. Three days before the execution sale the debtor filed his petition in bankruptcy. The creditor proceeded with said sale and purchased the real property at the sale. About three months later said real property was set aside to bankrupt as exempt. In a suit brought by the creditor to evict bankrupt from the property, *the court held that benkrupt could show that the question had been adjudicated by the bankruptcy court, and that the order of that court setting aside the property as exempt was binding upon the creditor who had previously purchased the property at execution sale.*

Said case was appealed to the U. S. Supreme Court, and its decision is reported in 196 U.S. 93, 49 L. Ed. 400. In affirming the decision of the Washington Supreme Court, it was stated:

"What seems to be complained of is that the

state supreme court accepted the judgment of the Federal Bankruptcy Court as having been rendered in the exercise of the jurisdiction with which it was vested.

"Plaintiffs in error were notified of the proceedings in bankruptcy as provided by the bankruptcy act, and, *if they had desired to contest the claim to exemption, they might have done so,* or could have invoked the supervision and revision of the order by the Circuit Court of Appeals; *but they did not do that, and could not question its validity in the state courts;* unless indeed it were absolutely void, which is not and could not be pretended.

"The bankruptcy court is expressly vested with jurisdiction 'to determine all claims of bankrupts to their exemptions'."

III

The Trustee Is Estopped from Attempting to Deny Bankrupt's Claim to Exemptions After Same Had Been Allowed

The trustee herein on August 31, 1948, filed his Report on Exemptions with the referee, in which he allowed to bankrupt all exemptions claimed. Thereafter on October 20, 1948, no exceptions to said report having been filed, the referee, at the request of the trustee, entered his Order Approving Trustee's Report on Exemptions.

Thereafter on November 2, 1948, the bankrupt in reliance upon the allowance of his exemptions insti-

tuted proceedings in bankruptcy court to have the transfers of his property to the corporation adjudged void (Tr. 9). Said proceedings were burdensome. They involved considerable expense and effort on the part of bankrupt. The trial of the issues consumed several days. All said efforts and money were expended in reliance upon the trustee's allowance of exemptions and the referee's order approving same. The bankrupt and his attorney cooperated with the trustee and aided him to a great extent in the joint efforts of the bankrupt and the trustee to have said transfers adjudged to be void as to both the trustee and the bankrupt.

No court of equity should permit the trustee to use the bankrupt to attain his ends by the allowance of his exemptions, and then when their joint efforts were successful allow such trustee to repudiate his own actions and deprive the bankrupt of exemptions theretofore allowed to him. By the doctrine of judicial estoppel this is not permitted.

In the case of *Axelrod v. Osage Oil & Refining Company*, 8 Cir., 29 F. 2d 712, 729, after discussing the fact that one of the litigants had on previous occasions taken a certain position in the proceedings by its conduct and pleadings, the court said:

> "It seems to us that it is bound by this course of conduct and the position so often taken, and cannot change its position after the Osage Company has relied and acted thereon. The Osage Company and the Continental Company were

both bound by the pleadings in the light of the agreements and understandings, and both were estopped to take positions inconsistent therewith. . . . . "

"In *Lavis v. Wakelee,* 156 U. S. 680, 689, 15 S. Ct. 555, 558 (39 L. Edn. 578), the court says:

'It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him'."

In the case of *Sinclair Refining Company v. Jenkins Petroleum Process Company,* 1 Cir., 99 F. 2d 9, at page 13, we find:

"The general rule is that one may not to the prejudice of the other party deny any position taken in a prior judicial proceeding between the same parties or their privies involving the same subject matter, if successfully maintained."

IV

The District Court Had No Jurisdiction To Award Any Funds in the Hands of the Trustee to the Receiver

All of the property of this bankrupt estate was in the possession of the bankrupt at the time of his adjudication in bankruptcy; and the bankruptcy court was the only court having jurisdiction to deal with the conflicting claims thereto. In the receiver's answer to the

show cause petition filed by bankrupt and the trustee, the receiver claimed some kind of equitable lien on said property, and claimed security by reason thereof (Tr. 18). But the receiver has failed utterly to comply with the basic requirements of the Bankruptcy Act, that in order to be entitled to any claim against property of a bankrupt estate in the hands of the bankruptcy court he must file a proof of claim within the time specified by law.

Sec. 57n of the U. S. Bankruptcy Act (11 U. S. C. A., Sec. 93 (n) provides:

> "Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed."

The receiver filed no proof of claim of any kind within the limited six-months period fixed by statute.

This question has been clearly decided in the recent case of *U. S. National Bank v. Chase National Bank,* 331 U. S. 28, 91 L. Ed. 1320, 1324, from which decision we quote:

> "Under these provisions there are several avenues open to a secured creditor of a bankrupt. See 3 Collier, Bankruptcy, 14th Ed. p. 149-157, 255-259. (1) He may disregard the bankruptcy proceeding, decline to file a claim and rely solely upon his security **if that security is properly and solely in his possession. . . . (2) He must file a secured claim, however, if the security is within the jurisdiction of the**

> **bankruptcy court and if he wishes to retain his secured status, inasmuch as that court has exclusive jurisdiction over the liquidation of the security.** *Isaacs v. Hobbs Tie & Timber Company,* 282 U. S. 734, 75 L. Ed. 645, 51 S. Ct. 270, 17 Am. Bankr. Rep. N. S. 273."

The above case holds that a secured creditor *must* file a claim if the property is within the jurisdiction of the bankruptcy court. Here there is no question of the jurisdiction of the bankruptcy court over the property; the trustee sold the property and received the proceeds. The receiver has not filed any claim. *The district court had no right and no jurisdiction to give to the receiver any funds of the bankrupt estate.* No decision could be more clear.

V

The Receiver Waived Any Claim He May Have Had to Any Specific Property of Bankrupt and Elected To Become a Creditor

Carney and Jonson in making their demands upon Hansen to turn over to the corporation all the property which he and his wife owned, including the wife's separate property, did not claim said property as belonging to the corporation, but did claim that Hansen owed the corporation money, and by their threat of criminal prosecution they obtained from Hansen all of his worldly possessions by way of security for the corporation's alleged claim against Hansen (Tr. 142).

The case of *Burgoyne v. McKillip,* 8 Cir., 182 F. 452,

clearly holds that under the facts existing in the case at bar there was an election on the part of the corporation to become a general creditor of Hansen. We quote from pages 453-4 of said decision:

> "When the company took from McKillip what was in substance a mortgage upon his property, it clearly did so as a creditor, and it cannot retain it and at the same time abandon the position then assumed."

In the case at bar the receiver has at all times sought to retain all of the property he secured from Hansen, well knowing that most of said property was not in any way acquired with funds belonging to the corporation or with funds coming from its bank account.

VI

The Finding of the District Court that All Money Derived from the Sale of Capital Stock of Vita-Pakt Associates, Inc. Was Property of the Corporation Is Clearly Erroneous

The total number of shares of capital stock of Vita-Pakt Associates, Inc., was 1,000. Hansen subscribed for 530 shares, and offered to pay for same by turning over to the corporation all equipment and business used in the operation of Vita-Pakt Associates, of which he was then sole owner, subject to the assumption by the corporation of all debts of said business (Tr. 103). The corporation accepted said stock subscription (Tr. 107). The corporation made an allotment of shares of 530 shares to Hansen and 260 shares for sale by the corpora-

tion (Tr. 108). 519 shares were sold for $51,900.00 and 96 shares were donated (Tr. 59). Out of said 615 shares thus disposed of the corporation owned only 260 shares already allotted. The balance of 355 shares must have belonged to Hansen. The money to which the corporation was entitled could not have exceeded $26,000.00. The balance of $25,900.00 must have belonged to Hansen. But the receiver claims, and the district court found, that this money, derived from the sale of Hansen's stock, belonged to the corporation, because of the mere irregularity in not having the stock certificates issued to Hansen.

The referee found as a fact:

> "That of the 615 shares of stock in said corporation which were sold or otherwise disposed of, a substantial though undetermined portion thereof belonged to Hansen. That the funds received from the sale of Hansen's stock, though deposited in the account of Vita-Pakt Associates, Inc., belonged to and remained the property of Hansen (Tr. 42-43).

How can the finding of the district court be other than clearly erroneous?

The sum of $5,897.00 which Hansen withdrew from the corporation bank account and used in the purchase of his home and car was his own money, as he had deposited in said account a much larger amount of his own money. There can be no tracing of trust funds un-

til a trust is established. No trust was here established because the money used by Hansen was his own money, derived from the sale of his own stock.

The inconsistency of the court's findings is shown by its order that the finding that Hansen had withdrawn $16,157.71 in corporation funds and appropriated same to his personal use

> "shall not be res adjudicata as to any claim filed by the receiver." (Tr. 61)

If that finding were true, then it should be an adjudication as to any claim filed by the receiver. The receiver and the trustee were both before the court in this proceeding. The court should not have made any finding against the interests of the bankrupt, which would not be binding upon all parties to the proceeding.

VII

The Finding of Fact that the Transfers by Hansen to the Corporation Were Voluntary and Not Obtained by Threat of Criminal Prosecution Is Clearly Erroneous

We believe the record proves conclusively that such transfers were obtained by duress and threat of criminal prosecution. Hansen testified that he executed said transfers because he thought he would have to go to jail if he didn't (Tr. 89-92).

Mrs. Hansen testified as follows (Tr. 172):

> "Q. What was your purpose in signing these papers?

A. Naturally, for the purpose of protecting him so he wouldn't have to go to jail. . . .

Q. Was that your only purpose in signing them?

A. That was the only purpose."

Carney admitted he did tell Hansen:

"that he had failed to get a permit to sell stock and had committed a gross misdemeanor by selling stock without such a permit."

and

"Hansen brought up the subject of whether or not the stockholders were going to prosecute, and I did say that probably the stockholders would feel more kindly toward him if he turned over the property to the corporation." (Tr. 192)

Yet in the face of the above uncontroverted testimony, the district court found that said transfers were made voluntarily. Clearly, such finding is erroneous.

In the case of *State v. Richards,* 97 Wash. 587, 167 P. 47,, defendant was charged with blackmail. He had accused one Thompson of assault, blackmail, larceny and other crimes in order to compel him to execute a certain lease of real estate.

Defendant contended that if he believed he was justly entitled to that which he demanded, such belief was a defense.

At page 589 (p. 48 of Pac. Reporter) the court said:

"It must be admitted that to commit the crime charged, there must be an intent to extort or gain,

> but that does not mean that one can by employment of the means used in this instance, compel another to bestow upon him that which he thinks or believes he is entitled to receive. . . . In this sense, one can commit this crime though he is of the opinion that the money thus sought is actually due him. The law does not countenance forceful and unlawful collection even of just debts, and when one uses the methods set forth in this statute to obtain money or property, he commits the crime defined in the statute, irrespective of the belief that is so doing he is only attempting to obtain that which he is entitled to receive."

In the case of *Bank of Fredericksburg v. Wendel,* 11 S. W. 2d 341, 342, the bank's officers threatened to prosecute plaintiff's husband (as was done in the case at bar), unless the wife conveyed certain property to the bank.

The court said:

> "The question is: Did these threats actually induce the act now sought to be nullified?"

We quote from the decision in the case of *Baker v. Morton,* 79 U. S. 150, 20 L. Ed. 262, 264:

> "Where a party enters into a contract for fear of loss of life or for fear of loss of limb or fear of mayhem, *or for fear of imprisonment* the contract is as clearly void as when it was procured by duress of imprisonment."

In the case of *Kronmeyer v. Buck,* 101 N. E. 935, a

lawyer accused a man of embezzlement and by threats of criminal prosecution obtained the conveyance of property, and obtained from a sister of the victim the execution of a promissory note.

We quote from the opinion, par. (1), p. 938:

> "We have no hesitation whatever in holding that the execution of the note by Mrs. Stachle was procured by duress. She was an innocent third party. There can be no pretense that she was indebted to Buck in any amount. . . . She signed the note to keep her brother from going to jail, and under the belief that if she signed it he would be saved from imprisonment and prosecution. . . . While no promise of immunity was expressly made, it is perfectly clear that both she and Kronmeyer were influenced by the understanding, which was clearly to be implied, that if the matter was adjusted satisfactorily Kronmeyer would not have to go to jail or be prosecuted."

The holding of the above case applies exactly to the matter of the conveyances by Mrs. Hansen, which conveyances under that holding are absolutely void because obtained under duress.

CONCLUSION

We respectfully submit:

That the district court was guilty of clear error in failing to affirm the order of the referee in bankruptcy.

That the award of exemptions to the bankrupt was res judicata, and it was beyond the power of the district court to set aside such award.

That appellant was clearly entitled to the exemptions provided by the laws of the State of Washington, and awarded to him by the trustee and the referee in bankruptcy.

That the receiver was not entitled to the award of any money in the hands of the trustee.

Respectfully submitted,

ALEXANDER WILEY,
Attorney for Appellant

No. 12481

In The United States Court of Appeals
For the Ninth Circuit

FAY J. HANSEN, *Appellant,*

vs.

ERNEST A. JONSON, RECEIVER OF VITA PAKT ASSOCIATES, INC., An Insolvent Corporation, and R. C. NICHOLSON, TRUSTEE OF THE ESTATE OF FAY J. HANSEN, BANKRUPT, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

BARKER & DAY, and
WILLIAM J. WALSH, JR.,
Attorneys for R. C. Nicholson, Trustee, Appellee.

1390 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT SHOWING JURISDICTION

District Courts of the United States are invested by Sec. 2(7) of the U. S. Bankruptcy Act (11 U.S.C.A. Sec. 11(7)) with original jurisdiction to determine controversies in relation to estates of bankrupts. Sec. 2 (11) of the Act confers jurisdiction on said courts to determine all claims of bankrupts to their exemptions. District Court judges are given power to consider records, findings, and orders certified to them by referees, and to confirm, modify or reverse such findings and orders, by Sec. 2 (10) of said Act.

Sec. 24 of the U. S. Bankruptcy Act (11 U.S.C.A. Sec. 47) vests appellate jurisdiction from the courts of bankruptcy in the United States Courts of Appeal.

The Referee's Findings of Fact (Par. IX) and Conclusions of Law (Par. V) On Show Cause Hearing (R. 35-46) and the Order on Show Cause Hearing (R. 49) and Supplemental Order On Show Cause Hearing (R. 47) denied the trustee's petition to set aside the order allowing the bankrupt his exemptions and expressly granted the bankrupt's claim to exemptions.

The Trustee timely filed his Petition for Review of the Referee's order. The District Court in the Order on Petition to Review (R. 79) reversed the Referee's order and denied the bankrupt his claimed exemptions, from which order the bankrupt has appealed to this court.

COUNTER-STATEMENT OF CASE

The trustee, in order to avoid any misunderstanding as to the issues involved, supplements the appellant's Statement of The Case in regard to the question of exemptions (with which the trustee is solely concerned), in the following particulars:

The assets of the bankruptcy estate have been reduced to cash pursuant to stipulation by all parties. The amount realized is $9,270.59. Of this sum the bankrupt claimed by way of exemptions $4,500.00, and the receiver of the corporation claimed he was entitled to trace and identify corporate funds misappropriated in the amount of $5,897.00. By the District Court's order the receiver did in fact reclaim $5,897.00, and the balance, $3,373.59, was awarded to the trustee for the benefit of the creditors of the estate free of any claim of exemptions by the bankrupt.

The bankrupt sought to have the transfers of his property to the corporation set aside on the ground that the transfers were made under duress in order that he might obtain his exemptions from the assets so recovered by the trustee. The trustee petitioned to have the transfers set aside on the ground that they constituted voidable preferences in order that these assets might be recovered for the benefit of the creditors of the bankrupt estate.

Therefore, contrary to the statement appearing on page 5 of Appellant's Opening Brief, the trustee did not join in the bankrupt's petition to set aside the bankrupt's conveyances to Vita-Pakt Associates, Inc., which petition was grounded on the allegation that transfers were made under duress; but rather the trustee filed a separate petition (R. 3, 27; Original Pleading 8-8) seeking an adjudication of the title to the property so transferred on the ground that the transaction constituted a voidable preference or fraudulent transfer as to the bankrupt's creditors.

After a hearing on these two petitions, the Referee declared the transfers invalid as to the trustee for the reason as stated by him in his Memorandum Decision (R. 30) that they constituted voidable preferences.

Before any order or findings were entered, but after the Referee announced his decision indicating that he would not make a specific determination that the transfers were procured by duress, (as had been requested by the bankrupt), the trustee orally petitioned the Referee to set aside his former order approving the allowance of the bankrupt's claim of exemptions. The Ref-

eree stated he would consider the trustee's original petition amended to embrace this request (R. 41). He considered the facts previously adduced in their application to this petition of the trustee, listened to argument of counsel and considered the authorities submitted (R. 268), and thereafter denied the petition on the merits as appears in his conclusions at Par. V (R. 46), Order On Show Cause Hearing Par. III (R. 49) and Supplemental Order On Show Cause Hearing Par. I (R. 47).

On petition for review the District Court disallowed the bankrupt's claim of exemptions for the reason that the transfer of all the bankrupt's property to the corporation constituted a voidable preference (R. 73-74). The District Court's grounds for disallowing the exemptions were twofold: (1) The Referee erred in that he should have upon reconsideration vacated his prior order allowing the exemptions, and (2) the District Court of its own motion had power to deny the bankrupt his exemptions and should do so. (District Court's Conclusions Par. V and VI) (R. 74).

SUMMARY OF APPELLEE'S ARGUMENT FOR AFFIRMANCE

The bankrupt-appellant attacks the District Court's denial of his exemptions for two reasons: (1) That he is entitled to his exemptions on the merits, and (2) that in any event after the entry of the Referee's original order approving the allowance of exemptions, (a) such order could not be reconsidered by the Referee, (b) although the Referee did in fact entertain a petition to reconsider his original order, and by order refused to vacate it on the merits, the District Court could not review such order of refusal, and finally, (c) the District Court could not of its own motion deny the bankrupt's claim to exemptions.

The trustee-appellee contends the bankrupt is not entitled to claim any exemptions for the reason that the property which he seeks to have set over as exempt is the very property transferred by him and recovered by the trustee as a voidable preference. Under Sec. 6 of the Bankruptcy Act, property so transferred and recovered by the trustee cannot be made the subject of a claim of exemption.

Within one week of the filing of his voluntary petition herein, the bankrupt, while insolvent, transferred all his property without any present consideration therefor, to Vita Pakt Associates, Inc., a corporation which he had controlled and managed. The effect of the transaction was to permit the corporation to receive a greater percentage of its claim than other creditors of the same class. Therefore, the transfers constituted

voidable preferences within Sec. 60 of the U. S. Bankruptcy Act (11 U.S.C.A. §96), and the transaction could be avoided and the property so transferred recovered by the trustee for the benefit of the estate.

Under Section 6 of the U. S. Bankruptcy Act. (11 U.S.C.A. §24), as amended in 1938, a voluntary preferential transfer of property by the bankrupt, not in excess of any amount thereby secured, prohibits an allowance to the bankrupt of exemptions from the property so transferred regardless of the intent of the bankrupt in making the transfer. This is a matter of positive statutory law supported by court decisions.

The transfer of property to the corporation was not made under duress as alleged by the bankrupt, but rather constituted a voluntary act of making partial restitution for funds misappropriated from the corporate bank account.

The transfers of property by the bankrupt were not made as security. It is not a question of securing a "debt", but rather a matter of restitution or repayment. In any event, the amount of the property transferred by the bankrupt and recovered by the trustee did not exceed any obligation for which the transfers might have been security.

Obviously, the transfer did not constitute a general assignment for the benefit of creditors, since they were absolute transfers for the benefit of one creditor among many.

In response to the appellant's second contention, the Trustee-appellee submits: That the allowance of exemp-

tions by the trustee and their approval by the referee when viewed in the light of the facts evoked at the subsequent show cause hearing, were clearly erroneous.

The Referee had the authority to vacate his order approving the allowance of exemptions, although more than ten days had elapsed since its entry, and after his reconsideration of the merits of that order, he should have done so.

A petition for review from the Referee's order denying the petition of the trustee to set aside the prior exemption order after a reconsideration of its merits, is reviewable by the District Court.

At all events, the District Court has the inherent power on its own motion to disallow the bankrupt his previously allowed exemptions at any time during the pendency of proceedings.

Finally, the District Court's findings and conclusions in this particular case are entitled to great weight in view of the fact that the Court, as it has power to do, called the bankrupt and other witnesses, and heard their testimony in open court before rendering his decision.

ARGUMENT

The trustee-appellee will direct his argument for an affirmation of the District Court's decision solely to Specifications of Error Nos. I, V, and VII which cover the denial of the bankrupt's claim to exemptions. For purposes of orderly procedure, the trustee will answer the arguments of the bankrupt-appellant in the sequence in which they are set forth in appellant's opening brief.

This Court Is Not Limited to a Determination as to Whether or Not the Referee's Findings Are Clearly Erroneous.

The District Court accepted in part the findings of the Referee, but drew contrary conclusions of law from those ultimate facts. Both the Court and the Referee found that the transfers by the bankrupt constitued voidable preferences (R. 67,42). However, the Referee was of the opinion that this fact did not warrant a disallowance of the bankrupt's claim to exemptions under Sec. 6 of the Bankruptcy Act, while the District Court concluded as a matter of law that it did.

Questions of law must be distinguished from questions of fact, and the presumption of correctness of referee's findings is not extended by General Order 47 to his conclusions of law. 8 Remington on Bankruptcy (4th ed.) 38, §3719.

The Referee having set forth the ultimate facts in his findings expressly refused to state as a conclusion of law that the transfers were made under duress, although specifically asked to do so by the bankrupt. The District Court found that these transfers were not made under duress (R. 64).

The District Court's findings were not based merely upon a review of the record. That court upon three separate days heard the testimony of the bankrupt and other witnesses in open court (R. 227-256) as it is empowered to do under the provisions of General Order 47 (11 U.S.C.A. following §53). The court therefore was afforded the opportunity to judge the credibility of the witnesses for itself. Judge Black stated:

"I have based my decision upon the record plus the evidence which I have heard in court, supplemented by the fact that I have had an opportunity to look at the witnesses and see their manner of testifying. Certainly, the evasive testimony of Mr. Hansen yesterday supported the appearance of evasiveness in his testimony as transcribed previously.

"The version of a man who did not know whether he had a dollar's worth of stock or thirty thousand in a company that he had organized a little more than a year ago, and which ran its course about a year ago is incredible." (R. 263.)

Consequently we are not here confronted with the usual situation where the district judge reviews the matter upon the record, and to which the cases cited by appellant are applicable.

Upon review the district judge has full discretion to hear all or any part of the case de novo under General Order 47 and to make findings of fact and conclusions of law for himself. *In re J. Rosen & Sons* (1942; C.C.A. N.J.) 130 F. 2d 81; *In re Fineman* (1940; D.C. Md.) 32 F. Supp. 212.

This very court has said that where the district court receives further evidence, General Order 47 requiring the court to accept a referee or special master's finding unless clearly erroneous, is not applicable. *In re American Mail Line, Ltd.* (1940; C.C.A. 9) 115 F. 2d 196.

The Bankrupt Is Not Entitled to Exemptions On the Merits.

We are in complete accord with the statements of appellant appearing on pages 10-11 of his brief that

the exemption provisions of the Bankruptcy Act should be liberally construed to aid those unfortunates whose circumstances requires them to invoke it. However, the case at bar in which a long continued course of fraud and deceit is openly admitted by the bankrupt (R. 260) would hardly seem the place to seek the application of the rule.

The implication contained in the statement of appellant on page 14 of his brief that the District Court disallowed the exemptions because of the bankrupt's fraudulent activities is unwarranted. The court denied the exemptions on the specific ground that the bankrupt having made a preferential transfer of his property, could not thereafter claim exemptions out of the very property so transferred under the express provisions of Sec. 6 of the Bankruptcy Act (R. 74).

A. The proviso of Section 6 of the Bankruptcy Act is directly applicable to the facts of this case.

Section 6 of the U. S. Bankruptcy Act (11 U.S.C.A. §24) stating that bankrupts shall be allowed the exemptions permitted by state law, contains a proviso as follows:

> "Provided, however, that no such allowance of exemptions shall be made out of the property which a bankrupt *transferred* or concealed and which is recovered, or the transfer of which is avoided under this Act for the benefit of the estate, except that where the voided transfer was made by way of security only and the property recovered is in excess of the amount secured thereby, such allowance may be made out of such excess." (Italics ours.)

Appellant apparently concedes that his transfer of property to the corporation constituted a voidable preference; and it is difficult to see how he could do otherwise in view of the findings of the Referee (R. 42) and District Court (R. 67). He seeks to avoid the effect of the proviso by contending that the transfer must be made with an intent to deprive creditors of their rights. No such requirement exists. The provision is specific, unambiguous and mandatory. *Since this* 1938 *amendment to the Act,* all that is required to make the provision applicable is a transfer by the bankrupt of property out of which he subsequently seeks his exemptions and an avoidance of such transfer by the trustee.

Collier explains the background of the amendment in this comment:

> "Before the 1938 Act, the decisions were in sharp conflict as to whether the bankrupt might claim his exemptions from property which has been transferred or concealed and recovered by the Trustee.
>
> . . .
>
> "Under the terms of the act of 1938, the conflict has been stilled.
>
> . . .
>
> "The Act of 1938, by amendment of Section 6, made it clear that where a Trustee secures possession of property *preferentially transferred,* the bankrupt may not thereafter claim his exemptions out of that property." (Italics ours.) 3 Collier (14th ed.) 843, §60.25.

To the same effect is a statement of Mr. Watson B. Adair, member of the National Bankruptcy Congress, in House Hearings on H.R. 6439, 75th Congress, First

Session (1937) 29, quoted in 3 Remington on Bankruptcy (4th ed.) 235, §1276:

> "The report of the Judiciary Committee of the House on the proviso added to Section 6, 11 U.S.C.A. §24, by the Act of June 22, 1938 (The Chandler Bill) said: '2. Exemptions. — §6: In the proviso added to this section, no allowance shall be made for exemptions out of the property which is recovered after a preference or fraudulent transfer. The decisions are conflicting, and it is considered that the law should be clear . . .' "

B. The bankrupt did not transfer his property to the corporation under duress.

The bankrupt next attempts to escape the effect of his preferential transfer by claiming that the transfer was involunary and made under duress. This question of fact was resolved against the bankrupt who had the burden of proving his assertion. Neither the Referee or the District Court found or concluded that the transfers were procured by duress. On the contrary the District Court found after extended testimony on the matter (R. 235-247) that the property was transferred to Vita Pakt Associates, Inc. voluntarily in an effort to make partial restitution. (R. 64).

C. The transfer did not constitute an assignment for the benefit of creditors.

In the hope of avoiding the effect of his preferential transfer, and thus the disallowance of his exemptions under Section 6 of the Act, the bankrupt attempts to wrap his transfer of property to Vita Pakt Associates, Inc. in the guise of a general assignment for the benefit of creditors. The fact is that he made *absolute* transfers

(R. 194-201) of all his property to one of many creditors for the sole benefit of that particular creditor. Obviously, such transactions do not come within the definition of an assignment for the benefit of creditors.

Black's Law Dictionary (3rd ed.) states at page 155:

> "Assignment for benefit of creditors. An assignment in trust made by an insolvent or other debtors for the payment of their debts. . . .
>
> "An assignment for the benefit of creditors, with directions to the assignee to prefer a specified creditor or class of creditors . . . (is) more usually termed a "preferential assignment' ".

In 21 Corpus Juris Secundum 1223, §4e the rule is stated:

> "Failure to create a trust prevents a direct transfer to creditors from being an assignment for the benefit of creditors."

The quotation from Collier appearing on page 18 of appellant's brief concludes with this passage:

> "Only where the purported general assignment may amount to a fraudulent or preferential transfer should the proviso of section 6 be employed to deny the bankrupt his exemption to property." (1 Collier (14th ed.) 844.)

D. The transfer was not made by way of security; and in any event, the property transferred did not exceed the amount of the obligation.

Section 6 of the Bankruptcy Act provides that where the preferential transfer of property by the bankrupt is made by way of security *only* and the amount of property recovered by the trustee is in excess of the

amount secured by such transfer the bankrupt may be allowed his exemptions out of such excess.

The absolute transfers of property by bills of sale, assignments, and deeds did not constitute a security transaction, but rather acts of repayment or partial restitution. The record is entirely devoid of any testimony that the transfers were made by way of security. The bankrupt never claimed they were given as security (R. 91-92). The Referee's finding (R. 42) that the transfers were given as security is a pure inference from the evidence, and is contradicted by the findings of the District Court (R. 64, 68).

The word "security" implies the existence of a debt. As stated in Black's Law Dictionary (3rd ed.) 1595:

> "Security. The term is usually applied to an obligation, pledge, mortgage, deposit, lien, etc., given by a debtor in order to make sure the payment or performance of his debt, . . ."

The court in *Clinton Mining & Mineral Co. v. Beacon,* 266 Fed 621, 622 defined the word debt in these terms:

> "The word 'debt' carries with it the requirement of certainty, the foundation of promise by express contract, and necessarily implies legality."

The bankrupt himself denies that he was indebted to the corporation (R. 157). We submit that the testimony of the receiver that the bankrupt "owed" the corporation $16,000.00, quoted by appellant, was a reference to the fact the bankrupt had misappropriated corporate funds to that extent. Under these circumstances how can it be contended that the transfers were made *by way of security only?*

Even if we make the unjustified assumption that the

transfers were given as security, there is no excess out of which the bankrupt may claim exemptions. The only conceivable debt which the transfers could have been given to secure is the corporation's claim that the bankrupt misappropriated $16,000.00 from its bank account for his personal use (R. 61). The amount recovered by the trustee before deduction of the sums successfully reclaimed by the corporation was only $9,270.59.

E. State court decisions are no longer controlling in determining the right of a bankrupt to claim exemptions.

The bankrupt's final argument in support of his contention that he should be allowed his claim to exemptions on the merits, is that state court decisions are controlling in the matter of exemptions. The appellant confuses the paramount authority of the Bankruptcy Act (since its amendment in 1938) in determining *the right to exemptions* with the authority of state law in determining what exemptions are *allowable.* State law controls the extent of property that may be claimed exempt. Federal law is determinative as to whether the bankrupt is entitled to claim any exemptions.

The case of *Van Slyke v. Baumgarner* (1934) 177 Wash. 326, 330, 31 P. 2d 1014, cited by appellant at pages 21-23 of his brief, is inapplicable. That case *decided prior to the* 1938 *amendment* to Section 6 of the Act held that a bankrupt might claim exemptions out of property preferentially transferred. Obviously, this decision would not have been the same under the present Section 6 of the Act, which expressly prohibits the

allowance of exemptions out of property preferentially transferred. The change is described by Collier:

> "The Act of 1938, by amendment of Section 6, made it clear that where a Trustee secures possession of property preferentially transferred, the bankrupt may not thereafter claim his exemptions out of that property." (3 Collier (14th ed.) 843, §60.25.)

The appellant's citation of the case of *In re Dudley* (D.C. Calif.; 1947) 72 F. Supp. 943 is wholly inapplicable. No question of a preferential transfer was there involved. The court merely held that nothing in the Bankruptcy Act prohibited an insolvent from converting his non-exempt property into exempt property on the eve of bankruptcy. The case of *Turnbeaugh v. Santos* (C.C.A. 9) 146 F. 2d 168 is to the same effect. We have no quarrel with the rule announced in these decisions, but they have no bearing upon the question presented in the case at bar.

III.

Referee's Original Order Approving the Allowance of the Bankrupt's Exemption Is Not Res Judicata.

A. The referee had the power to reconsider and vacate his order allowing the bankrupt's exemptions.

The trustee takes the position that the Referee had the power to reconsider and vacate the order allowing the bankrupt's exemptions.

The Referee's Order Approving Trustee's Report of Exemptions was entered October 20, 1948. At that time, the bankrupt's position as evidenced in his petition and testimony under oath at the first creditor's meeting was that the transfer of all his property to Vita

Pakt Associates, Inc. was procured under duress. Several months after the entry of this order, the Referee at the conclusion of the Show Cause Hearing, specifically refused to conclude as a matter of law that the transfers by the bankrupt were made under duress. Thereupon, the trustee deeming that under this state of facts, the prior allowance of exemptions was erroneous, requested the Referee to vacate his Order Approving Trustee's Report of Exemptions. After hearing argument on the trustee's petition to vacate the order, and considering the authorities submitted by the trustee, the Referee decreed that the trustee's petition would be denied (R. 46-47) for the reason that he did not believe he had power to vacate his prior order (R. 268).

This procedure on the part of the trustee was proper. An ex parte order is not reviewable. The trustee should move to vacate it, and then to petition for review of the order refusing to vacate. 8 Remington on Bankruptcy (4th ed.) 10, §3703. To the same effect: *In re Snyder* (C.C.A. 9; 1925) 4 F. 2d 627 *In re Rustigan* (D.C. Calif., 1943) 50 F. Supp. 827.

The Referee, like any other court, has the power to vacate an ex parte interim order during the pendency of the bankruptcy proceeding.

2 Collier (14th ed.) 1426, §38.09.

> "Although there has been considerable authority that a Referee, once having made an order, has no such power to reconsider and amend or vacate it, the better view seems to be that the *Referee,* as a court, has such power."

2 Collier (14th ed.) 1475, §39.17.

> "*Referee's Power to Reconsider Order.* A dis-

> cussion of the Referee's power to reconsider his own orders appears in §38.09, Supra. As indicated in that section, it has frequently been argued that 'except in the matter of an allowed claim, Referee exhausts his jurisdiction by exercising it,' and that 'once having acted, a Referee may not review his own action'. The better view, however, would give the *Referee* the same power to reconsider or vacate his own orders as the District Judge has over his orders; 'That power is, of course, limited in duration when there are terms of court, but in bankruptcy there are none'."

The case of *In re Faerstein* (C.C.A. 9, 1932) 58 F. 2d 942, cited by appellant on page 28 of his opening brief to the effect that an order of a Referee is conclusive unless a petition for review is filed in the District Court within ten days of its entry was decided prior to the decision of the United States Supreme Court in *Wayne United Gas Co. v. Owen-Illinois Glass Co.* (1937) 300 U.S. 131, 57 S. Ct. 382, 81 L. ed. 557, and is therefore of no controlling force.

The United States Supreme Court, relying on the foregoing case, stated in *Pfister v. Northern Illinois Finance Corp.* (1942) 370 U. S. 144, 63 S. Ct. 133, 87 L. ed. 146:

> "Where a petition for rehearing of a Referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on, that is, they may be granted 'before rights have vested on the faith of the action,' and the foundations of the original order may be re-examined. *Wayne United Gas Co. v. Owen-Illinois Glass Co....*"

In Indemnity Ins. Co. v. Reisley (C.C.A. 2; 1945) 153 F. 2d 296, the trustee on March 6, 1945 filed a petition for reconsideration of the Referee's order entered April 14, 1942. After a hearing, the Referee denied the petition on the ground that he no longer had the power to reconsider his prior order, and the District Court affirmed this decision. The then Circuit Court of Appeals reversed the decision saying:

> "The Insurance Company argues that the trustee's appeal is from the denial of the petition for reconsideration of an earlier order, and is therefore not appealable. We do not agree. This being a bankruptcy proceeding, the Referee as the Court of bankruptcy, had discretion to re-examine and vacate the former order."

B. The trustee is not estopped to seek a vacation of the referee's order allowing exemptions.

The appellant contends on pages 35-37 of his opening brief that the trustee is estopped from attempting to deny the bankrupt's claim to exemptions after they had been allowed.

It has heretofore been shown that at the time the exemptions were allowed, the position of the bankrupt was that he had transferred all his property under duress. The trustee was unaware of the true facts surrounding the transfers until the subsequent hearing on the show cause orders. Appellant's own citations of authority bear out the principle that there can be no estoppel where the person against whom the estoppel is claimed is ignorant of the true facts.

In the case of *Axelrod v. Osage Oil & Refining Com-*

pany (C.C.A. 8) 29 F. 2d 712, 729, cited by appellant, the complete statement of the court with the omitted portion in italics is as follows:

> "It seems to us that it is bound by this course of conduct, and the position so often taken, and cannot change its position after the Osage Company has relied and acted thereon. The Osage Company and the Continental Company were both bound by the pleadings in the light of the agreement and understandings, and both were estopped to take positions inconsistent therewith. *It is said in* 21 C.J. 1223, §227: '*A party who has with knowledge of the facts assumed a particular position in a judicial proceeding . . .*'".

The omission (set forth in italics) from appellant's quotation from the case of *Sinclair Refining Company v. Jenkins Petroleum Process Company* (C.C.A. 1) 99 F.2d 9, 13 is pertinent:

> "*There is obviously no estoppel by deed, nor are the elements present to constitute an estoppel in pais, or equitable estoppel. To constitute such an estoppel, all the essential elements must be present, among which is ignorance of the true facts on the part of the person claiming the estoppel.* The general rule is that one may not to the prejudice of the other party deny any position taken in a prior judicial proceeding between the same parties or their privy involving the same subject matter, if successfully maintained."

C. The District Court Had Jurisdiction to Review the Referee's Order Denying the Trustee's Petition to Set Aside the Allowance of Exemptions.

The trustee grants that no petition has ever been filed to review the Referee's original "Order Approv-

ing Trustee's Report of Exemptions," dated October 20, 1948. However, upon petition therefor, the Referee reconsidered and re-examined the merits of the Order Approving Allowance of Exemptions, and thereafter denied the petition to set aside the allowance of exemptions. A petition for review lies as a matter of right from this subsequent order of denial by the Referee.

Chronologically, the matters leading up to the filing of the Petition for Review were as follows: The Trustee's Report of Exempt Property was filed September 3, 1948. No objections to this report having been filed within the ten days prescribed by General Order 17, the Referee entered his *ex parte* Order Approving Trustee's Report of Exemptions on October 2, 1948. During the pendency of the Show Cause Hearing, when it became apparent that the bankrupt's transfers of property to the corporation were not made under duress, the trustee orally petition the Referee to reconsider and set aside his former order approving the allowance of exemptions. The Referee entertained this petition (R. 41). He considered the authorities submitted, and heard argument of counsel (R. 268), and after such re-examination of the merits of his original order (R. 69), denied the trustee's petition to disallow the exemptions (R. 46-47). He stated his reasons for the denial of the petition as being that he doubted the proviso of Sec. 6 of the Act would prohibit the allowance to the bankrupt of exemptions from property preferentially transferred, and that he did not think he had authority to vacate his prior order after the time for appeal therefrom had expired (R. 268). This fact is evidenced by the question proposed in his Certificate

on Review (R. 7). Thereafter, the trustee sought a review in the District Court of the Referee's order of denial by filing his Petition for Review within the time prescribed by Sec. 39c of the Act (11 U.S.C.A. §67c).

It should be noted that the Referee did not refuse to entertain and reconsider the trustee's petition, but rather having entertained the petition and re-examined the merits of the original exemption order, he entered an order refusing to vacate the prior exemption order.

Under this state of facts, the case cited by appellant on page 33 of his brief, *Bernards v. Johnson* (1941) 314 U. S. 19, 86 L. ed. 11, is not in point. That case holds that an order of a conciliation commissioner denying a petition for rehearing which is dismissed because the petition was filed out of time, *without reconsideration of the merits,* does not extend the time for appeal from the original order.

The rule applicable to the case at bar is that even though a petition for rehearing is not filed until after the expiration of the period limited for review, if such petition is filed in good faith and is entertained and considered on its merits, a petition for review taken within the statutory period after disposition of such petition is timely.

Wayne United Gas Co. v. Owens-Illinois Glass Co. (1937) 300 U.S. 131, 81 L. ed. 557, 57 S. Ct. 382;

Pfister v. Northern Illinois Finance Corp. (1942) 317 U.S. 144, 87 L. ed. 146, 63 S. Ct. 133;

Indemnity Ins. Co. v. Reisley (1945, C.C.A. 2) 153 F. 2d 296, cert. den. 328 U.S. 857, 90 L. ed. 629, 66 S. Ct. 1349;

In *Pfister v. Northern Illinois Finance Corp.* (*supra*) the court said at page 137:

> "When such a petition for rehearing is granted (by the conciliation commissioner) and the issues of the original order are re-examined, and an order is entered their denying or allowing change in the original order, the time for review under Sec. 39c begins to run from that entry (citing cases)."
>
> . . . .
>
> "It is quite true that in a petition for review *upon the ground of error in law* in the original order, the examination of the grounds of the petition for rehearing is equivalent to a re-examination of the basis of the original decree." (Italics ours.)

In *Indemnity Insurance Co. v. Reisley* (*supra*), an order of a referee entered April 14, 1942 was the subject of a petition for reconsideration filed by the trustee on March 6, 1945. Upon denial of the petition, the trustee filed a petition for review in the District Court. The Court of Appeals held the petition for review was timely, stating:

> "On Petition for Rehearing.
>
> "As the order of April 14, 1942, was based upon the reclamation petition, we erred in our original opinion when we said that Section 57 Sub K, 11 U.S.C.A. §93 sub k, governed. Nevertheless, Rule 16(b),.28 U.S.C.A. following Sec. 723c is not applicable because it relates only to a final order; and no order in a bankruptcy proceeding is final, (in

the sense that it cannot be reopened) until the proceeding has been terminated.

. . . .

"The petition for review was timely. For where an application is made for reconsideration, the time for review begins to run from the date of denial of such relief, provided the referee reconsiders the merits of the original order. We think that the referee did thus reconsider the merits, for he based his denial of the relief on res judicata (i.e. the rejection of a previous petition for reconsideration) which was a defense on the merits."

Appellee submits that the timely filing of his petition for review under Sec. 39(c) of the Act gave him as a matter of right the opportunity to have the District Court review the Referee's action in denying the petition to set aside his former exemption order.

The contention of appellant that because no petition for review of the Supplemental Order on Show Cause Hearing was ever filed, the District Court's decree is rendered invalid, mistakes the office of that pleading. Its purpose was merely to clarify the provisions of the Order On Show Cause Hearing, which is the subject of the Petition for Review. Upon the testimony of the attorneys and the Referee, the District Court found the trustee's petition to vacate the order allowing exemptions was before the Referee, was embraced in his findings and conclusions, and was in fact denied by him, and that the supplemental order is not necessary to make such denial effective. (R. 69, 275.)

D. The District Court in the exercise of its inherent powers, denied the bankrupt's claim to exemptions on its own motion.

In addition to reversing the order of the Referee on the ground that he should have after reconsideration set aside his order allowing the bankrupt's exemptions, the District Court after hearing denied the bankrupt's claim of exemptions *on its own motion.*

Counsel for the bankrupt conceded in open court that the court had inherent power to do so.

8 Remington on Bankruptcy, §3724, page 25 (Suppl.):

> "A District Judge may at any time sua sponte entertain a petition to review an order of the Referee. (Citing: *Heiser v. Woodruff,* 150 F. 2d 867 (1945, C.C.A. 10); cert. den. 326 U.S. 778.)"

8 Remington on Bankruptcy, §3724, page 42:

> "*Review on Judge's Initiative.* The judge has authority on his own initiative to review any order of the Referee before the estate is closed. (Citing cases.)"

The United States Supreme Court in *Pfister v. Northern Illinois Finance Corp.* (1942) 317 U. S. 144, 63 S. Ct. 133, 87 L. ed. 146 granted certiorari because of a conflict in circuits as to whether the ten day period for filing a peition for review was a limitation on the right of an aggrieved party to appeal, or on the power of the reviewing court to act.

Justice Reed speaking for the court said:

> "We do not think Section 39(c) was intended to be a limitation on the sound discretion of the Bankruptcy Court (District Court) to permit the filing of petitions for review after the expiration of the

period. The power in the Bankruptcy Court to review orders of the Referee is unqualifiedly given in Section 2 (10). The language quoted from Section 39(c) is rather a limitation on the 'person aggrieved' to file such a petition as a matter of right."

CONCLUSION

We submit that under the mandatory provisions of Sec. 6 (11 U.S.C.A. §24) as applied to the facts in the case at bar, the bankrupt is not entitled to an allowance of exemptions; that the District Court had jurisdiction to review the findings and order of the Referee, and the Court's decision reversing the order of the Referee and denying the bankrupt's claim to exemptions on the District Court's own motion, should be affirmed.

Respectfully submitted,

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WILLIAM J. WALSH, JR.
Attorneys for Appellee.

No. 12481

In The United States Court of Appeals
For the Ninth Circuit

FAY J. HANSEN, *Appellant,*

vs.

ERNEST A. JONSON, Receiver of Vita-Pakt Associates, Inc., an insolvent corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, bankrupt, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

ANSWERING BRIEF OF APPELLEE, ERNEST A. JONSON, RECEIVER OF VITA-PAKT ASSOCIATES, INC., AN INSOLVENT CORPORATION

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577 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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INTRODUCTION

The portion of the brief of the Appellant, Fay J. Hansen, on which he seeks to reverse the judgment awarded the Appellee, Ernest A. Jonson, Receiver of Vita-Pakt Associates, Inc., and to which this Answering Brief is directed appears under the headings numbered IV, V, VI, and VII, and on pages 35 through 46 of Appellant's brief. The facts out of which the controversy in question arose are of vital importance. Appellant's Statement of the Case is deemed incomplete and therefore Appellee has made a detailed Statement of the Case and it is supported from the Transcript of the Record. Appellant's presentation of the issues involved does not appear to present them as Appellee

views them; therefore, Appellee has stated issues and presented argument first without reference to Appellant's brief, and then specifically answers Appellant's argument.

Appellant's Statement Showing Jurisdiction of the Court of Appeals of this appeal is not controverted.

STATEMENT OF THE CASE

In July, 1947, Fay J. Hansen commenced selling fresh orange juice in Seattle, Washington. Prior to December, he acquired a partner, one Paul D. Shaeffer, and the business was expanded to include the production, as well as sale, of fresh orange juice. As of December 31, 1947, the business had a net operating loss of approximately $15,000.00 (R. 314, Rec. Ex. 27), and the net worth was $14,014.13, consisting principally of $6,000.00 in good will and $3,870.30 denominated as drawing account of Fay J. Hansen. Hansen and Shaeffer agreed to dissolve the partnership as of December 31, 1947, Hansen to purchase Shaeffer's interest for $17,000.00. Hansen then promoted the corporation known as Vita-Pakt Associates, Inc. Articles of Incorporation were filed on February 3, 1948. Fay J. Hansen and Rosemary Hansen, his wife, and Thomas Todd (of the Seattle Bar) were the incorporators and first directors (R. 113 and 134). Authorized capital stock was 1,000 shares of no par stock. The paid in capital was $500.00.

Hansen was President and a member of the Board of Directors from the date of the first meeting to a time shortly prior to the appointment of the receiver in August, 1948. Mrs. Hansen was Secretary-Treas-

urer and a member of the Board of Directors through the same period. Thomas Todd was elected Vice-President and resigned and Dr. Burkhart succeeded him in office, both as Vice-President and as a member of the Board of Directors (R. 134).

Hansen agreed to transfer all of the assets of the partnership business, subject to its liabilities, to the corporation in exchange for 530 shares of stock of the authorized value of not less than $100.00 per share (R. 103, Rec. Ex. 27). The corporation received all of the assets of the partnership. No formal instrument of transfer was executed.

Books of account of the corporation were opened as of January 1, 1948. The closing entries of the partnership books were transferred to and became the opening entries of the corporation books (R. 210, Rec. Ex. 27).

Only one certificate of stock, the qualifying share, was issued to Hansen (R. 118). This was transferred to Dr. Burkhart, as shown by the stock records. Certificates for 615 shares of stock were issued by the corporation for which the corporation received $51,900.00 (R. 223, and R. 216, Rec. Ex. 27). 519 shares were issued on cash sales at $100.00 per share; 96 shares were issued as bonus stock.

Hansen, as promoter, as President, as General Manager, and as a member of the Board of Directors, assumed to dominate and did dominate all the affairs and activities of the corporation. The books of account and records of the corporation were opened and maintained under his direction and supervision. He directed

the manner in which cash received from the sale of stock was entered in the books of account of the corporation and, at all times during the active existence of the corporation, had possession of its books and records. The information contained in the books and records was not conveyed to the stockholders at any meeting duly authorized, or in any manner whatsoever throughout the entire corporate existence (R. 116-118, 170). No mention was made by Hansen to the stockholders that the money received from the sale of stock was not the property of the corporation or that any portion of the money was credited to Hansen by way of a "Drawing Account" or that Hansen had pledged the credit of the corporation to obtain real or personal property which he claimed as his own, or that Hansen had an interest in and to any money received from the sale of stock or an interest in and to any shares sold for cash (R. 93, 96, 119).

Certificates for 615 shares, as stated, were issued by the corporation. Hansen set up an account in the general ledger entitled "Capital Stock Sales." Credited to the corporation from such sales was $51,900.00. This capital stock sales account showed only cash received. Hansen, who had the stock records, issued 96 shares as bonus stock (R. 214, Rec. Ex. 27, R. 222, 224).

Hansen, as President and General Manager, sold each share of stock for which cash was received, on the representation that he was drawing a salary of $100.00 per week and nothing more from the business; that the proceeds from the sale of stock were needed and were to be used by the corporation for working capital. During the entire period in which stock sales

were effected, Hansen made no statement to any person that he was selling all, or a portion of, the 530 shares which were to be issued to him. On the contrary, he stated from time to time that he was issuing and he did issue shares of stock as bonus stock stating that same were from "his own private stock" as an inducement for the purchase of stock and the loaning of money to the corporation (Tr. p. 94). Hansen set up a "Fay J. Hansen Drawing Account" in the general ledger without any corporate resolution of any kind, and he proceeded to draw a sum slightly in excess of $16,000.00, as shown from the drawing account (R. 219, 220, Rec. Ex. 27). This money was used by Hansen for his own purposes at various times. During the period in which Hansen was unlawfully appropriating the corporation's funds, the corporation operated at a loss and did not have sufficient moneys to operate and pay the various drafts which were drawn in favor of Hansen and others (R. 112, Rec. Ex. 2, R. 119-121). Hansen borrowed money from stockholders from time to time as indicated from the "Note Payable Account" of the books (R. 212, Rec. Ex. 27). These funds together with receipts from the sale of stock and sales of merchandise all were received by the corporation and went into the corporation bank account (R. 125). Hansen, to assist himself in acquiring property for himself individually, engaged in a process of kiting checks between the corporation bank account in the Bank of California and his personal account in the Seattle-First National Bank (Broadway Branch). These entries were carried in the general ledger of the corporation

under the heading "Special Loan Account." (R. 216-218, Rec. Ex. 27).

The details of the entire matter in which Hansen appropriated the money of the corporation were known only to himself and his wife, the additional director (R. 226). No meeting of the directors was ever held, nor was any stockholders' meeting ever formally called or held. In the course of time, the corporation became hopelessly insolvent. The stockholders did not become suspicious of Hansen's manipulation until the latter part of July, 1948. Hansen had been misrepresenting conditions to them to keep them satisfied (R. 121-123, Rec. Ex. 8). An audit of the books by a certified public accountant engaged by the stockholders revealed for the first time the fact that Hansen had appropriated a sum in excess of $16,000.00 to his own uses and purposes and, thereafter, the stockholders, acting with diligence, confronted Hansen with the information they had acquired.

As previously mentioned, some of the stockholders engaged a certified public accountant the latter part of July and also engaged a lawyer, Mr. Elvin P. Carney, to investigate the condition of the corporation and take action to protect the corporation and the stockholders. At a meeting held on July 24, 1948, attended by some of the stockholders, Hansen, the accountant and the attorney, Hansen admitted his false representations in selling stock and procuring loans and that the company was virtually insolvent, but he did not then disclose the fact of his unauthorized withdrawal of corporation funds.

On July 29, 1948, Hansen went voluntarily to the

office of Mr. Carney and, with the accountant present, Hansen was confronted with the fact that he had sold stock and procured loans on misrepresentations and that he had misappropriated corporation money. In the discussion that followed, Hansen admitted withdrawing funds from the corporation bank account and using the same for the purchase of his house, car and furniture. He then claimed for the first time that of the stock that was sold, some of it was his; that he considered himself entitled to all the money charged to the Fay J. Hansen Drawing Account as a matter of right. As a result of the entire discussion, which covered a period of approximately an hour, more or less, Hansen agreed to transfer his property to the corporation. He voluntarily went out and got his wife and returned (R. 92, 93). Two stockholders were present on their return. Hansen and wife resigned as officers and directors and their successors were elected and Hansen and his wife executed instruments of conveyance conveying property to the corporation, as follows:

Bill of Sale to automobile;

Quitclaim Deed to residence property, 4113 S. W. 109th Street;

Purchaser's Assignment of Real Estate Contract, being Lot 1, Block 3, Arroyo Vista, a vacant lot, purchased in part by Mrs. Hansen prior to the marriage;

Bill of Sale to appliances and furniture.

Hansen and wife were not restrained or coerced in any manner nor was any force or threats of any kind made to them to induce or persuade them to execute and deliver the aforesaid instruments, and Hansen and

wife executed and delivered the instruments voluntarily and of their own free will.

Ernest A. Jonson was appointed temporary receiver of Vita-Pakt Associates, Inc. on August 4, 1948. His appointment was made permanent and he qualified on August 9, 1948. The corporation was hopelessly insolvent. It appeared from records of the corporation that the corporation had sustained substantial operating losses in January and each month thereafter during its operation. It further appears, in reference to the corporation, that there was no account showing a liability of the corporation to Hansen, nor was there any account showing funds received from the sale of any of Hansen's stock (R. 222, 223). There is no account whatsoever in the corporation records that tends to substantiate in any respect Hansen's claim that he was selling his own stock.

On August 5, 1948, Hansen filed a voluntary petition in bankruptcy and claimed exemptions in his house, furniture and automobile. Further proceedings had in connection with the exemptions are set forth in the appellant's statement of the case. The bankrupt and the Trustee petitioned the Referee in Bankruptcy to issue an order citing the receiver of Vita-Pakt Associates, Inc., into court to show cause why the transfers previously made by Hansen should not be set aside. The receiver resisted such action, denying that the transfers were void under any part of the bankruptcy act and denying that the transfers constituted a voidable preference, and claimed that the transfers consisted of the return of property to the corporation, purchased in substantial part with corporate funds and

that to the extent that corporate funds were traced into the property the transfers should be sustained. The Referee in Bankruptcy, after trial of the matter, entered an order adjudging the transfers made by the bankrupt to be void. The findings of fact of the Referee are to be found on pages 35 through 44 of the transcript. The decision of the Referee was reversed by the District Court on the petition of the receiver of Vita-Pakt Associates, Inc., appellee herein, for review of the Referee's order. The decision of the District Court was that the sum of $5,500.00 of corporation funds was traced into the Hansen residence and the sum of $397.00 of corporation funds was traced into the automobile, and such funds less certain expenses were awarded to the receiver. A detailed analysis of these transactions is as follows:

1. Hansen, without any authority of the Board of Directors or the stockholders, and without their knowledge, withdrew corporation funds from the corporation bank account for his own personal use. On April 15, 1948 Hansen issued his own personal check for $397.00 on the Seattle-First National Bank (Broadway Branch) as down payment on a 1948 Oldsmobile, which check was presented for payment by the payee and paid at a time when funds in Hansen's personal account consisted of corporation funds appropriated by him by way of corporation check to his favor and deposited in his personal account.

2. On March 11, 1948, Hansen issued his personal check for $1,000.00 in favor of Herbert U. Taylor as down payment on premises known as 4113 S. W. 109th Street, Seattle, Washington, being property purchased from said Taylor. Taylor by agreement

withheld sending the check in for collection. On March 16, 1948, Hansen caused to be issued a corporation draft in favor of himself in the sum of $1,100.00 and charged the same to his drawing account. This check was deposited in his personal account and the $1,000.00 check to Taylor was presented for payment and paid from the corporation funds in his personal account.

3. Hansen made a further payment on the price of the residence by pledging the credit of the corporation and appropriating the proceeds thereof. As President of the corporation he executed a note in favor of Dr. John B. Kiefer on June 30, 1948, in the sum of $3,000.00 and a note to Dr. C. M. Starksen in the sum of $2,000.00 evidencing funds loaned to the corporation (R. 222, Rec. Ex. 30). He received the proceeds on June 30, 1948, and deposited the same in the corporation bank account on the same day (Rec. Ex. 32). Prior to that deposit, the corporation had an overdraft in its account at the Bank of California. After the deposit, Hansen procured a cashier's check in the sum of $4500.00 which was charged against the corporation bank account and made payable to Herbert U. Taylor and was applied by Taylor on the price of the residence purchased by Hansen (R. 142-145), Rec. Ex. 33).

Hansen admits that funds went into the purchase of the house as claimed (R. 160) and also admits that the car was purchased with such funds. The Referee in Bankruptcy in his memorandum decision stated with reference to proof of tracing of funds from the corporation bank account into the property as follows (Tr. p. 32):

> "The receiver met the burden of proving that $4500.00 was taken out of the bank account of the

> corporation and paid to one Taylor for building a house for Hansen's personal use on real estate standing in his name, and other transactions were proven with like clarity."

but declined to make a finding to that effect.

It is considered that the issues as raised by the appeal of the appellant are as follows:

1. Was the appropriation by Hansen of funds from the bank account of Vita-Pakt Associates, Inc. a misappropriation of corporation funds?

2. Were such funds traced into the property purchased by Hansen and wife?

3. Was the transfer by Hansen and wife to Vita-Pakt Associates, Inc. a preference within the meaning of the Bankruptcy Act and therefore voidable by the Trustee of the estate of the bankrupt?

4. Was the transfer by Hansen and wife of the property in question to Vita-Pakt Associates, Inc. made under circumstances constituting legal duress?

ARGUMENT IN SUPPORT OF JUDGMENT IN FAVOR OF APPELLEE

I.

Was the Appropriation by Hansen of Funds from the Bank Account of Vita-Pakt Associates, Inc., a Misappropriation of Corporation Funds?

This issue involves several related legal points which will be presented first.

1. Hansen, as an officer and director had a fiduciary relation to the corporation and its stockholders and was a trustee of the corporation property in his custody and could not act in a manner adverse to the corporation, its property, and its stockholders.

Remington's Revised Statutes of Washington, (1939 Supplement) Sec. 3803-33;

Sacajewea Lumber & S. Co. v. Skookum, 116 Wash. 75, 198 Pac. 1112;

Clark County v. Hiim, 177 Wash. 251, 31 Pac. 905;

Shuey v. Holmes, 22 Wash. 193 (1900);

Hein v. Forney, 164 Wash. 309, 2 P. (2d) 741;

Fletcher, Cyclopedia of Corporations (Perm. Ed.) Vol. 3, Secs. 854, 910, 1077, 1113.

Rem. Rev. Stat., Sec. 3803-33 provides as follows:

> "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith, and with that diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

In *Sacajewea Lumber & S. Co. v. Skookum, supra,* the court stated at page 78:

> "A director of a corporation occupies a strictly fiduciary capacity and it is always his duty to fully represent the interests of the corporation of which he is a director."

In *Clark County v. Hiim, supra,* D, an officer of P, loaned money to B, taking a chattel mortgage on 200 head of cattle. Some cattle were sold and D converted the funds to his own use. P sued D and his surety, and

D contended that the cattle were in fact owned by him and that the converted funds were used by him to purchase more cattle and thus P's security was not impaired. Such evidence was held inadmissible under the pleadings, but with respect to the right of D generally to make such defense, the court stated:

> "Assuming the absence of the rule which requires the pleadings of affirmative defenses, appellants will not be heard to say that the cattle were, in fact, owned by Hiim, who was a fiduciary officer and employee of the respondent. This employee made a loan of his employer's money to Bethea. He represented his employer, and the mortgage so recites, that Bethea was the sole owner of the cattle. He permitted Bethea to sell some of the mortgaged cattle, and then accepted the proceeds of such sales with the understanding that the money would be used in payment of the chattel mortgage. That money was diverted by Hiim to his own use—none of it was turned over to Hiim's employer, the one entitled thereto. Neither Hiim nor his surety is in a position to say that Hiim did not receive the money as agent for the respondent. Hiim was acting in a fiduciary capacity and his misappropriation of the money turned over to him by Bethea, the money which he knew belonged to respondent, makes Hiim responsible therefor."

In *Shuey v. Holmes, supra,* D gave his note to the bank, of which he was director and a stockholder, in payment of shares of bank stock; on insolvency of the bank and suit by the receiver on the note, D filed an answer stating that the note was given merely as accommodation in that he intended to take the stock only temporarily until it could be sold and paid for by actual

purchasers, as the bank had come into ownership of the stock and could not legally own it. The demurrer to the answer was sustained, the court stating at page 195:

> "As against creditors of the insolvent bank, who were represented by the plaintiff in the present action, the defense must be regarded as insufficient, and the case as presented upon the present appeal, falls within that of *Barto v. Nix,* 15 Wash. 563, (46 Pac. 1033) wherein it was said:
>
> ' "A director is an officer of the bank, and it is through the board composed of himself and his associates that its business is transacted. To hold that one of these can make a note to the bank and to have it taken up as a part of its assets, and afterwards, when such a note is sought to be enforced against him in the interests of the creditors of the bank, set up a secret agreement which nullifies the note, would be contrary not only to all legal rules but to all principles of justice.'
>
> "To hold otherwise would be to open the door to the frauds of the grossest character. To uphold a secret agreement of the character here set up, as against creditors, would be a dangerous innovation."

Hein v. Forney, supra, holds that directors of an insolvent corporation cannot prefer themselves at the expense of creditors. That the same rule applies to stockholders, see *Mitchell v. Jordan,* 36 Wash. 645, 79 Pac. 311.

2. Where one in a fiduciary capacity mingles trust property, with his own property, the burden is upon him to establish what property is his.

Collier on Bankruptcy (14th Ed.) Vol. 4, page 1144;

Remington on Bankruptcy (4th Ed.) Vol. 5, Sec. 2465, page 790;

Pomeroy's Equity Jurisprudence (5th Ed., Symons) Vol. 3, Sec. 1058d;

Tucker v. Brown, 20 Wn. (2d) 740, 150 P. (2d) 604;

In re Royea's Estate, 143 Fed. 183 (D. C., Wash., WD, ND, 1906);

National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 693.

In *Tucker v. Brown, supra,* the Washington court states the general rule, which is also found in the remaining citations, as follows:

"(19) The general rule is that the claimant of a trust must, in cases where the rights of creditors are affected, trace the fund by evidence that is clear and satisfactory. (*Rugger v. Hammond,* 95 Wash. 85, 163 Pac. 408) and that, if he fails to so trace and identify the fund, his claim is that of a general creditor. *Davis v. Shepard,* 135 Wash. 124, 237 Pac. 21, 41 A.L.R. 163; *In re Jordan's Estate,* 171 Wash. 624, 18 P. (2d) 855.

"However, after the trust is proven and property and funds identified, the burden is on the trustee to account in a satisfactory manner for the property and funds, 65 C.J. 904, Trusts Sec. 799."

In *In re Royea's Estate, supra,* the bankrupt has trust funds in his personal bank account, the balance of which $390.10, was turned over to his trustee. Claimant's claim to recover the trust funds was defended on the theory that where the bankrupt had mingled trust funds with his own, the identify of the trust funds was lost and such funds could not be recovered. This contention was rejected, and allowance of the claim affirmed on review. The court cited *National Bank v. Insurance Co., supra,* quoting from the syllabus:

> "As long as trust property can be traced and followed, the property into which it has been converged remains subject to the trust; and, if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies in every case of a trust relation, and as well as to moneys deposited in a bank, and to the debt thereby created, as to every other description of property."

and, continuing, the court said:

> "In this case, although the money can not be specifically identified, the fund is clearly proved to have been enlarged by mingling trust money with other money, and the equitable right of the petitioner to reclaim an amount equal to the amount entrusted is clear."

Coming now to the factual part of the issue, we will examine Hansen's contentions. He contends that the funds withdrawn from the corporation bank account and charged to his drawing account (R. 219, Rec. Ex. 27) and used to purchase the house and car were his funds, and that such funds were the proceeds from the sale of his stock (R. 152, 161; Par. VI, pp. 40-42,

appellant's brief). He admits that proceeds from the sale of orange juice, of loans for the corporation, and from the sale of stock all went into the corporation bank account (R. 124-125; 160-161). He admits that he cannot identify just what shares of stock he ever owned (R. 118-119), or what shares of his were ever sold, or when any of his shares were sold, or to whom his shares were sold (R. 118-119; 124; 162-163; 236) or how many shares he owned on the day he conveyed the property in question (R. 236). He made a belated effort to compute his shares (R. 162-167) and to identify a purchaser of certain shares (R. 237) but such testimony is entirely inconsistent with his prior testimony.

Hansen's bald assertions constitute the sole evidence, if it can be called evidence, in support of his contentions. The record completely disputes Hansen's testimony. But one share was ever issued to him, which he admits (R. 118). The corporation by-laws with respect to issue and transfer of shares were not compiled with (R. 105-106, Rec. Ex. 2; 176-177). The corporation books contained no account of any of Hansen's stock transactions (R. 222-223; 214-216, Rec. Ex. 27). No one else knew that Hansen was selling his stock, and he did not tell the stockholders, nor a prospective stockholder that his, Hansen's, stock was being sold (R. 93-94; 96; 118-119).

Of the funds used by Hansen to purchase his house, it is undisputed that $5,500.00 came from the corporation bank account (R. 156, 160). It is also undisputed —Hansen nowhere ever contradicts the record—that $4,500.00 of such funds was the proceeds of the loans from Dr. Kiefer and Dr. Starksen as evidenced by

Receiver's Exhibit 27 (R. 213); Exhibit 30 (R. 222); 32 (not in the transcript), 33 and 34 (R. 142-145). Hansen's case to that extent completely fails. As to the remainder of his case, it is simply a question of whether any of Hansen's testimony can be believed and whether the requirements of the applicable law as heretofore set forth have been met. As to the law, Hansen was an officer and a stockholder of the corporation and as such had a fiduciary relation to the corporation and its stockholders (Rem. Rev. Stat., Sec. 3803-33, *supra*).

He admittedly mingled his own funds (if we believe him) with corporation funds (R. 124-125, 160-161) and under the law previously cited had the burden of identifying his funds and property and segregating the same from the corporation funds which were trust funds. Under the decision of *Clark County v. Hiim, supra,* Hansen could not assert ownership to the funds in the corporation bank account. Under the decision in *Shuey v. Holmes, supra,* he could not set up a secret agreement between himself as an individual and himself as an officer and director of the corporation that would serve to defraud the corporation, its stockholders and creditors. Under the decision of *Hein v. Forney, supra,* even if it were considered that his depositing the proceeds of stock in the corporation bank account constituted a loan and an indebtedness to him were established, he could not prefer himself by paying any indebtedness due him from the corporation. As to the credibility of Hansen's testimony, it is submitted that evasive, self-contradicting and inconsistent testimony is not worthy of belief. Furthermore, the testimony of an admitted swindler (R. 96-102, 121, 125) is hardly

worthy of belief when it is against the interests of innocent people. The word of a man who represents his net worth as $70,000.00, based on stock ownership of a corporation that had an operating loss of $35,000.00 for five months (R. 166-167) and who valued a business having a net worth of approximately $14,000.00 and an annual deficit of $15,000.00 as worth "does not exceed the sum of $100,000.00" is hardly worthy of belief.

It is submitted that the Referee in Bankruptcy in his Memorandum Decision (R. 23, at p. 32) and Findings of Fact No. XII (R. 42-43) placed the burden of proof on the wrong party when placing it upon the Receiver to prove the amount of Hansen's stock or funds as was done; and in any event was incorrect in holding that the Receiver had not established a trust fund. It was admitted that as of June 25, 1948, of the stock that had been sold, $26,000.00 was property of the corporation and to which Hansen had no claim (R. 108, Rec. Ex. 2; p. 116, 130)—thus there were corporation funds with which the fiduciary (Hansen) mingled his own funds (if we believe him). It is further submitted that, as decided by the District Court, the Referee's Findings of Fact were clearly erroneous and that there is no evidence to support them.

II.

Were the Funds So Misappropriated by Hansen Traced Into the Property Purchased by Hansen and Wife, Specifically the Residence and Automobile?

As set forth in the statement of the case, *supra,* pp. 10-11, the Referee in Bankruptcy stated in his Memorandum Decision that the Receiver did trace funds as

claimed from the corporation bank account into the residence and did trace other items, which included the automobile (R. 23, at p. 32). Hansen admitted that $5,500.00 went into the house (R. 156, 160) and that $397.00 went into the automobile (R. 149). Furthermore, it is undisputed that $4,500.00 was the proceeds of loans made on behalf of the corporation and was withdrawn from the corporation bank account on June 30, 1948 (R. 142-145, Rec. Ex. 33 and 34), and furthermore, nowhere in appellant's brief is the fact of the tracing of the funds resisted.

III.

Was the Conveyance and Transfer by Hansen and Wife of Property to Vita-Pakt Associates, Inc., a Preference Within the Meaning of the Bankruptcy Act and Voidable by the Trustee of the Estate of the Bankrupt?

Where trust funds or other property are converted by the bankrupt they may be traced and recovered, so may its proceeds, if they can be identified and traced; and repayment or return by the bankrupt of such property or property into which the same can be traced does not constitute a preference that can be avoided by the trustee in bankruptcy.

1. ***Trust funds or property may be traced and recovered from a trustee in bankruptcy.***

Cook v. Tullis, 18 Wall (U.S.) 332, 21 L. ed. 933;

Thomas v. Taggert, 209 U.S. 385, 52 L. ed. 845, 28 S. Ct. 519;

Morris Plan Industrial Bank of N. Y. v. Schorn, 135 F. (28d) 538 (2 Cir., 1943);

In re Franklin Savings & Loan Co., 34 F. Supp. 585, (D.C., Tenn., 1940);

In re Franklin Savings & Loan Co., 34 F. Supp. 661, (D.C., Tenn., 1940);

Remington on Bankruptcy (4th Ed.) Vol. 5, sec. 2463, 2464, p. 743;

Pomeroy's Equity Jurisprudence (5th Ed., Symons) Vol. 4, sec. 1058b, 1058c.

In *Cook v. Tullis, supra,* the trustees in bankruptcy sought to recover a note and mortgage conveyed to defendant by bankrupt, the same being in substitution of bonds held by bankrupt for safekeeping and converted. The Court found for the defendant, stating at page 937 (21 L. ed.):

> ". . . still the trustees must fail in their suit. They took the property of the bankrupt subject to all legal and equitable claims of others. They were affected by all equities which could be urged against him. Now it is a rule of equity jurisprudence, perfectly settled and of universal application, that where property held upon any trust to keep, use, or invest it in a particular way, is misapplied by the trustee and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its transformations, and will be subject, when found in its new form, to the rights of the original owner or cestui que trust."

The case of *In re Franklin Savings & Loan Co.* first cited, *supra,* involved a preferred claim to funds as trust funds in the hands of the trustee. Stock had been converted by the bankrupt and pledged as security for notes given another bank. On default, the stock was

sold and proceeds applied on the note and the balance returned to the bankrupt with the notes, which ultimately came into the hands of the trustee. The referee's decision denying the preferred claim was reversed on review, the court holding that the claimant was entitled to trace her property into the balance of funds in the hands of the trustee and was also subrogated to the rights of the payee of the notes.

In the second *In re Franklin Savings & Loan Co.* case, *supra,* the bankrupt had converted stock certificates and pledged them as security for a loan. Proceeds of the loan were re-loaned and notes received which were pledged as security for other loans. Funds and notes traced from the original loan were in the hands of the trustee in bankruptcy. The district court reversed the decision of the referee and held that the funds and notes evidencing the original funds received on converting and pledging stock were traced and could be recovered.

2. *Return of trust property or proceeds of property into which traced does not constitute a voidable preference.*

Fisher v. Shreve, Crump & Lowe Co., 7 F. (2d) 159 (D.C., Mass. 1925);

Rockmore v. American Hatters & Furriers, 15 F. (2d) 272 (2 Cir.);

Collier on Bankruptcy (14th ed.) Vol. 4, Sec. 60.18, p. 814-15;

103 A.L.R. 310, annotation entitled "Restoration of or making compensation for money or property obtained by breach of trust,

fraud, or other tort, as a voidable preference under the bankruptcy act."

The general rule is stated in 103 A.L.R., 310, at p. 311, as follows:

"II. Restoration of specific money or property, or its proceeds.

"The restoration of the specific money or property that the bankrupt had obtained by breach of trust, fraud, or other tort, or money or property into which it can be traced under the rules of equity with regard to tracing trust property, is not a voidable preference under the American Bankruptcy Act, where by reason of the tort the one to whom it is restored has a right to rescind the transaction by which he was deprived of it and to recover the specific money or property, or its proceeds from the bankrupt, since such a restoration is merely a return of the money or property to its rightful owner, and not a transfer of the property to a creditor. (citing cases)."

In *Rockmore v. American Hatters & Furriers, supra,* the court held that the return by the bankrupt of the identical fur skins, together with promissory notes covering fur skins sold, to the vendor, within four months prior to bankruptcy was not a voidable preference.

It is submitted that on the basis of the foregoing decisions and references, the corporation was entitled to trace the funds of the corporation as misappropriated by Hansen, its officer and director, into the property purchased by Hansen; and to the extent that the funds were traced, as set forth previously herein, the return and conveyance of the property by Hansen to the cor-

poration is not a voidable preference, and the judgment in favor of the Receiver should be affirmed.

IV.

Was the Transfer by Hansen and Wife of the Property in Question to Vita-Pakt Associates, Inc., Made Under Circumstances Constituting Legal Duress?

The burden of proof is on the bankrupt to prove duress. In transactions involving the making of contracts, settlements or compromises arising out of claims asserted in good faith against the complaining party, there is a presumption of want of duress. One smarting under a wrong may advise the other party that he is subject to criminal prosecution if the wrong is both civil and criminal in its nature, and such act does not constitute duress.

Thorne v. Farrar, 57 Wash. 441, 107 Pac. 347;

Ingebright v. Seattle Taxicab & Transfer Co., 78 Wash. 433, 139 Pac. 188;

Bertchinger v. Campbell, 99 Wash. 143, 168 Pac. 977;

Cooley v. Davis, 114 Wash. 196, 194 Pac. 968.

In Thorne v. Farrar, supra, the court refused to annul a marriage entered into on the day following threats of criminal prosecution to plaintiff, stating that time elapsed from the time of the threats to time of marriage during which plaintiff had an opportunity to seek advice of counsel, and quoting from *Meredith v. Meredith,* 79 Mo. App. 636:

> "Threats and acts of intimidation do not necessarily prove duress, and where the party was under a moral obligation to enter into or discharge a contract, the presumption is that he acted from

a sense of moral duty, and this presumption should be weighed in the scale against the evidence of duress. . . ."

In *Bertchinger v. Campbell, supra,* the court stated as follows:

". . . there is running through all the decisions relied upon by counsel for respondent in this case the element of presumption that, when one yields to a demand made upon him in good faith, accompanied by a fair show of legal right in the one making the demand, he does not yield because of duress in the legal sense."

In *Ingebright v. Seattle Taxicab & Transfer Co.,* the court refused to set aside a transfer of a truck by plaintiff to defendant company made in settlement of claims of defendant against plaintiff for funds admittedly misappropriated by plaintiff. Defendant's officers and attorney had threatened plaintiff with criminal prosecution, or rather had advised him that he was subject to criminal prosecution, but no force was proven, and plaintiff had been permitted to leave the conference room twice. The court stated (p. 436):

"Do these facts constitute duress? We think not. Under the appellant's testimony, he had unlawfully appropriated money which belonged to respondent. The respondent had a right to say to him that, if he did not settle, it would commence a civil action. It also had a right to point out to him that he was subject to a criminal prosecution. Under his own testimony, the good faith of the charge that he was subject to criminal prosecution cannot be questioned. It is not duress for one who in good faith believes that he has been wronged to threaten the wrongdoer with a civil suit; and if the wrong

includes a violation of the criminal law, it is not duress to threaten him with a criminal prosecution. . . ."

Judge Black concluded in his written opinion (R. 257-265) that the corporation had not made any demand upon Hansen (R. 258) and his wife—and without a demand by the corporation, the corporation cannot be charged with legal duress. Apart from such conclusion, Hansen's testimony is replete with admissions that he defrauded and swindled the stockholders and fraudulently induced the original purchase of stock, subsequent stock and loans. The stockholders did not know of his drawing account, and he did not tell them of it (R. 117, 119, 129). The summary of unreported testimony and reported testimony of the witnesses, Dr. Chatalas (R. 185, 255); Dr. Kiefer (R. 177, 247); Dr. Dougherty (R. 182, 228); and Dr. Jankelson (Tr. 202) clearly shows the fraudulent conduct of Hansen. Hansen was aware of all this at the conference with Mr. Carney and Mr. Ernest Jonson, and their testimony was that these fraudulent matters were discussed, and Hansen admits that probably some of it was brought out at that time (R. 95-96, 125, 91). There was therefore a basis for a claim on behalf of the corporation—a basis for a claim in good faith against Hansen. There was no force. Hansen voluntarily left the office and returned of his own volition (R. 89-90, 81-92) with his wife. Under the facts and circumstances as above set forth, there can be no conclusion but that as stated by Judge Black (R. 259-260):

"He had a moral and legal obligation to try to

return to the corporation the funds which he had taken without authority."

and

"His conveyances and transfers were voluntary on his part, stimulated by *his* idea that it was good policy for him to make the transfers with the hope that the stockholders would not prosecute him."

Under the law of the State of Washington as decided by its Supreme Court heretofore cited, legal duress was not proven by Hansen. His testimony, such as it was, is not worthy of belief as against the testimony of Mr. Carney (R. 231-234) and Mr. Jonson (R. 241-243). The cases cited by appellant do not control this question which is controlled by the Washington law. The Washington case cited by appellant is not in point.

ARGUMENT IN ANSWER OF APPELLANT'S POINTS

1. Appellant contends on pages 37-39 of his brief that

"IV.

"The District Court Had No Jurisdiction to Award Any Funds in the Hands of the Trustee to the Receiver."

and asserts that the Receiver should have filed a claim in the bankruptcy proceedings as a secured creditor. This is actually part of the basic question—was the property in question that of the bankrupt or in part that of the corporation. If the corporation traces its funds into the property, the corporation is not a creditor, but a property owner. The statute and case cited by appellant are not in point.

2. Appellant contends on pages 39-40 of his brief that

"V.

"The Receiver Waived Any Claim He May Have Had to Any Specific Property of Bankrupt and Elected To Become a Creditor."

The basic question, again, is whether the property in question was that of the bankrupt or in part that of the corporation. The Receiver by resisting the claims of ownership of Hansen does not thereby waive the claims of the corporation as an owner of part of the property under the equity tracing rule. Appellant appears to argue, from the case cited, that the corporation elected to become a general creditor, which is an entirely different argument from that in his heading. The cited case is not in point since the transaction in question was not a security transaction—it was a conveyance of property by deed and bill of sale and not the giving of a mortgage.

3. Appellant's contentions on pages 40-42 are believed to be fully answered in Appellee's brief in the first question discussed in the Argument in Support of Judgment in Favor of Appellee.

4. Appellant's remaining contention on pages 42-46 is believed to be fully answered in Appellee's brief, in the last question discussed in the Argument in Support of Judgement in Favor of Appellee.

CONCLUSION

We respectfully submit:

That the Findings of Fact of the Referee in Bankruptcy were clearly erroneous in that there was no evidence to support them; that the Conclusions of Law and the Order of the Referee in Bankruptcy were clearly erroneous.

That the Order of the District Court on petition for review should be affirmed in every respect insofar as it awarded judgment to the Appellee, Receiver of Vita-Pakt Associates, Inc.

Respectfully submitted,

JOHNSON & DAFOE,
Attorneys for Appellee

No. 12481

In the United States Court of Appeals for the Ninth Circuit

FAY J. HANSEN, Appellant

v.

ERNEST A. JONSON, Receiver of Vita-Pakt Associates, Inc., an Insolvent Corporation, and R. C. NICHOLSON, Trustee of the Estate of Fay J. Hansen, Bankrupt, Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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INTRODUCTION

In a studied attempt to prejudice this court against the bankrupt, both the trustee and receiver have called him vile names and made numerous accusations against him which are not justified by the record. While he may have made some misrepresentations during the final stages of the corporation in order to keep it going, only a small amount of stock was sold on such misrepresentations. He deposited in the bank account of the

corporation over $25,000.00 of the proceeds from the sale of his own stock. He used about $10,000.00 of this amount to pay debts which the corporation had assumed. He is accused by the receiver of using less than $6,000.00 in the purchase of his home and car. Such a record does not warrant the indiscriminate calling of names. We prefer to confine ourselves to the facts in the record and the issues of law involved.

REPLY TO RECEIVER'S BRIEF

The Funds Used by Hansen Did Not Belong to Vita-Pakt Associates, Inc.

Neither at the trial of this cause before the referee in bankruptcy, nor at the hearing on the petition for review before the district court, nor in this court, has the receiver ever even attempted to explain how the 530 shares of stock in Vita-Pakt Associates, Inc., which belonged to Hansen, and which were paid for by him, could have become the property of the corporation. He has not attempted to explain because no explanation can be given. For counsel seriously to contend that this corporate stock became the property of the corporation merely through the failure to issue said stock to Hansen and then transfer it to third party purchasers, instead of issuing it direct to the purchasers, seems to us nothing short of ridiculous.

The receiver has attempted to put upon Hansen the burden of establishing what particular dollars deposited in the bank account of the corporation belonged

to Hansen and what particular dollars belonged to the corporation. Such a contention is not based upon reason. When Hansen deposited in the bank account of the corporation $25,000.00 of his own money, derived from the sale of his own stock, he was entitled to withdraw from that account that amount, and in doing so would not be guilty of misappropriating any money of the corporation.

The length to which counsel goes in order to cast reflections upon Hansen is shown by the statement on page 9 of his brief that:

> "Hansen without any authority of the board of directors or the stockholders, or without their knowledge, withdrew corporation funds."

When we realize that Hansen and his wife were members of the board of directors, it seems that Hansen is accused of withdrawing money from the bank without notifying himself, and authorizing himself to do so. As far as counsel's statement is concerned—that the stockholders didn't know of the withdrawal of this money—I believe that stockholders do not in general know of everything done by corporate officers and directors; and we know of no rule of law or reason that would require the corporate officers to inform the stockholders of every act performed by such officers.

The Conveyances by Hansen Were Obtained by Duress

The receiver simply denies that the conveyances by

Hansen and his wife were obtained by duress. On this point we are willing to submit the matter on the testimony not only by Hansen but by the receiver's own witnesses. This case may easily be distinguished from the cases cited by counsel in his brief pertaining to duress. Hansen was accused of the crime of selling stock without a permit from the state, and this accusation was made principally to induce him to transfer his own property to the corporation in order to avoid criminal prosecution for a crime that had nothing whatever to do with his acquisition of this property.

The District Court Had No Jurisdiction To Award Any Funds to the Receiver

The receiver has been unable in any way to show that the District Court had the power to award him any funds when he failed to file a creditor's claim in the bankruptcy proceedings. Now, for the first time, he realizes that as a secured creditor he should have filed a creditor's claim before he could possibly have any right to any assets of the bankrupt estate. In a desperate attempt to escape his dilemma he now makes the claim that he was not a creditor but was the owner of said assets. As a complete answer to that contention, we refer to the receiver's answer to the petition and order to show cause (Tr. 18-19). We quote from the prayer of his answer:

> "1. That the following property be adjudged and decreed to be subject to a trust *and equitable*

lien in favor of respondent. . . .

"2. That the aforesaid property be sold, and said trust *and equitable lien attach to the proceeds thereof.*" (italics ours)

Thus we see from the receiver's own pleadings that at the trial before the referee in bankruptcy he took the position that he had a lien upon the assets of the bankrupt estate. He did not claim to own the assets. *He could not ask the court to impress a lien in his favor upon his own property.*

Despite the receiver's attempt to change his position for the first time in this court, he is absolutely precluded by the decision in the case of *U. S. National Bank v. Chase National Bank*, 331 U. S. 28, 91 L. Ed. 1320, from any right to any funds of the bankrupt estate. The U. S. Supreme Court in that case held that a secured creditor, if the security is within the jurisdiction of the bankruptcy court, *must file a secured claim* if he wishes to retain his secured status. The receiver's bald statement that that case is not in point does not alter the facts.

REPLY TO TRUSTEE'S BRIEF

Trustee's Misstatement of Case

On page 2 of trustee's brief he states that bankrupt claimed by way of exemptions $4,500.00. We refer to trustee's Report of Exempt Property (Tr. 8) in which the trustee allowed as exempt: real property

$4,000.00, furniture $500.00, wearing apparel $300.00, equity in automobile $250.00—a total of $5,050.00.

On page 3 of trustee's brief is the statement that the referee declared the transfers invalid as to the trustee. But in fact the referee held said transfers "Void," without any qualification or limitation whatever (Tr. 48).

The Referee's Order Should Have Been Affirmed on Review

The trustee apparently admits that the findings of the referee were well supported by the evidence, but claims that the district court did not need to affirm the referee's order because he heard some of the witnesses testify perfunctorily on some of the issues. We do not believe that the policy of the bankruptcy law as set forth in General Order 47 can be completely overthrown by the fact that the District Court heard a few witnesses testify on a few of the issues involved. For instance, the wife of the bankrupt had testified at length before the referee as to the circumstances under which she was forced to sign the transfers to the corporation, but the District Court did not desire to hear her testimony (Tr. 247).

Nor do we believe that a district court is warranted in hearing testimony of witnesses at the hearing of a petition for review of the order of the referee, except under unusual circumstances which would justify such action. In the case of *In re J. Rosen & Sons*, 3 Cir.

130 F. 2d 81 (cited by trustee), the referee made no findings of fact or conclusions of law. The court said:

> "The district court had the power and authority to receive further evidence if the record before the referee was incomplete."

In the case at bar there was no claim that the record before the referee was incomplete in any particular.

The Trustee Does Not Even Attempt To Defend the Denial of Bankrupt's Claim of Exemption to Wearing Apparel

Not one word do we find in the brief of the trustee which even seeks to justify the denial of the bankrupt's claim of exemption to his wearing apparel. Yet the District Court denied this claim of exemption (Tr. 79). Does the trustee wish to have this court entirely overlook that claim of exemption and the denial thereof? If he is entirely unable to conceive of any justification for the denial of this exemption, why is he not frank enough to say so?

The Trustee Is Estopped To Seek To Vacate the Referee's Order Allowing Exemptions

The trustee claims that he is not estopped to attempt to vacate his own report on exemptions and the order of the referee approving same, which was entered upon the trustee's own application, because he was not aware of the true facts when the allowance was made. Surely during the course of the trial before the referee

over a period of several days he must have become cognizant of the true facts. He admits that he did not attempt to secure the setting aside of this order until the referee had announced his oral decision. The trustee did not act when he learned the facts; he acted only after the court had announced its decision. The trustee had no right to change the position which he had taken in such judicial proceedings, and in which he had been successful, merely because it would be to his interest to do so—to the prejudice of the bankrupt who had aided and cooperated with him in successfully maintaining that position.

The Transfers From Bankrupt Were Obtained by Duress

The trustee attempts to make much of the fact that in the referee's findings there is no specific statement that the transfers by bankrupt to the corporation were made under duress. It is true there is no finding in those specific words. The referee did find that the transfers were *void* (Tr. 48). Furthermore, the findings of fact made by the referee show beyond question that said transfers were obtained by duress and threat of criminal prosecution (Tr. 38-39).

Referee's Order Approving Allowance of Exemptions Was Res Judicata

In another attempt to justify his position that the allowance of exemptions was not res judicata the trustee called the order approving allowance of the trus-

tee's report on exemptions an "ex parte" order. Can he be unmindful of the provisions of General Order in Bankruptcy No. 17, which requires that the trustee's report of exemptions shall be on file for ten days, as notice to all the world of its contents, and notice to all interested parties that any objections thereto must be filed within ten days? It is only after such public notice to all the world that the order approving the trustee's report on exemptions can be entered. Such an order is not in any sense of the word an "ex parte" order.

The trustee contends the referee had the power to set aside his former order, and states that the case of *In re Faerstein*, 9 Cir., 58 Fed. 2d, 942, was decided prior to the case of *Wayne United Gas Company v. Owen-Illinois Glass Company*, 300 U.S. 131, 57 S. Ct. 382, 81 L. Ed. 557, and, therefore, no longer is the law. An examination of the above cited decision reveals that said case discusses the power of bankruptcy courts to entertain petitions for rehearing. The National Bankruptcy Act. (11 U. S. C. A., Sec. 1(10) defines "Courts of bankruptcy" as the district courts of the United States. Such definition does not include referees in bankruptcy; and accordingly this decision does not in any way concern or decide the powers of referees in bankruptcy.

The District Court Had No Power To Deny Exemption on Its Own Motion

This question has been settled beyond all doubt by the United States Supreme Court in the case of *Bernards v. Johnson*, 314 U.S. 19, 86 L. Ed. 11, cited on page 33 of our opening brief.

The trustee erroneously states that counsel for the bankrupt in open court conceded that the district court had such power. Nothing could be farther from the truth. The record shows that counsel for bankrupt constantly objected to the action of the district court, and contended said court had no power to deny the exemptions (Tr. 53-54).

The District Court Had No Jurisdiction To Reverse the Referee's Order Approving Allowance of Exemptions

First: There is no word in the record of the proceedings before the referee in bankruptcy that the referee re-examined the merits of his original order. There is no word that the petition for rehearing was granted. A court speaks only through its orders. The referee ordered that the petition to set aside the allowance of exemption be denied (Tr. 47). The petition on the part of the trustee was oral; no facts were alleged. There was no allegation of any fact upon which the referee could have granted a rehearing.

Second: However, even if the trustee were correct in his statement that the merits of the original order

were re-examined and a rehearing granted, the trustee's petition was denied. The trustee could then have petitioned for the review of th original order approving exemptions. This he did not do. He contends that he petitioned for the review of the order refusing to set aside the original order. He cites as authority for his position the case of *Pfister v. Northern Illinois Finance Corp.,* 317 U.S. 144, 87 L. Ed. 146, 63 S. Ct. 133. This case holds (p. 150):

> "When such a petition for rehearing is granted, and the issues of the original order are re-examined, and an order is entered, either denying or allowing a change in the original order, the time for review under 39(c) begins to run from that entry."

However, that case further holds that (p. 150):

> **"A refusal to modify the original order, however, requires the appeal to be from the original order, even though the time is counted from the later order refusing to modify the original. AN APPEAL DOES NOT LIE FROM THE DENIAL OF A PETITION FOR REHEARING."**

Thus we see that by the holding of the very case which the trustee cites he could not appeal from the denial of his petition for rehearing. He could have reviewed the original order of the referee approving the allowance of exemptions, but this he did not do. He petitioned for the review of the order of the ref-

eree refusing to set aside the original order. The Supreme Court of the United States in this cited case clearly holds **that such an appeal does not lie.**

CONCLUSION

We summarize:

Bankrupt was entitled to the exemptions allowed him by the laws of the State of Washington, and set apart to him by the trustee.

The referee's order approving the allowance of exemptions was res judicata.

The order of the District Court awarding funds of the bankrupt estate to the receiver and denying bankrupt's exemptions was clearly erroneous.

The order of the referee in bankruptcy awarding exemptions to the bankrupt and denying any award to the receiver should be affirmed.

Respectfully submitted,

ALEXANDER WILEY,
Attorney for Appellant.

SEPTEMBER, 1950

No. 12482

United States
Court of Appeals
for the Ninth Circuit.

PACIFIC PORTLAND CEMENT COMPANY,
a corporation,

Appellant,

vs.

WILLIAM A. BELLAMY,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorneys for Defendant and Appellant.

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1906 Hobart Building,
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the District Court of the United States for the Northern District of California, Southern Division

No. 28909E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, and PACIFIC PORTLAND CEMENT COMPANY, a corporation,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains and alleges that:

As and for a First cause of action:

I.

At all times herein mentioned defendant Southern Pacific Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and that said defendant, at all times herein mentioned, was, and now is engaged in the business of a common carrier by railroad in interstate commerce at the Station of Redwood City, County of San Mateo, State of California.

II.

At all times herein mentioned, defendant Southern Pacific Company was a common carrier by railroad, engaged in interstate commerce, and plaintiff

was employed by defendant Southern Pacific Company in such interstate commerce, and the injuries sustained by him hereinafter complained of arose in the course of and while plaintiff and defendant Southern Pacific Company were engaged in the conduct of such interstate commerce.

III.

This action is brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq.

IV.

On or about April 4, 1949, at or about the hour of 5:35 P.M., plaintiff was regularly employed by defendant Southern Pacific Company as a brakeman of defendant Southern Pacific Company's local freight train Extra No. 2345 West at said Station of Redwood City, California.

At said Station of Redwood City the main-line track extends over the Bayshore Highway and in a sharp curve to the left toward and to the plant of the defendant Pacific Portland Cement Company. Said main-line track, on the outside curve thereof, is paralleled in close proximity thereto by a state highway known as the Redwood Harbor Road. Directly opposite said Harbor Road and across said main line, at an approximate distance of 75 feet from the intersection of said Bayshore Highway with said main line, is located a switch-stand of a spur track leading off of said main line

at said point and extending toward the right in a curved direction to the left.

At said time and place said freight train, consisting of 16 freight cars and a caboose, tender and locomotive, had arrived at said station and said yards, and was engaged in doing station switching over said main-line track and said spur track, and it became and was the duty of plaintiff to take a position upon said Harbor Road directly opposite from said switch-stand.

At said time and place defendant Southern Pacific Company carelessly and negligently failed to provide for plaintiff a safe place to work and did, on the contrary, carelessly and negligently maintain an unsafe and dangerous place for said plaintiff to work, among others, in the following respects: Said Harbor Road at said time and for a long period of time prior thereto was heavily used and traveled, and known by defendant Southern Pacific to be so used and traveled by motor vehicles, passenger automobiles, and freight trucks. In such switching movement a portion of said freight train was upon the main-line track curving to the left with the engine moving the same in a back-up position. The purpose of the movement was to pull from said spur track said cars of said train, and as the same cleared the spur track, it was plaintiff's duty to throw the switch. Neither the engineer nor the fireman of said engine crew had any, or adequate, view of said Harbor Road, nor of motor vehicles using and traveling the same, coming in the direc-

tion from said Pacific Portland Cement Company plant. Defendant Southern Pacific Company negligently failed to provide any person to warn or means of warning, or notice to the operators of motor vehicles so traveling said Harbor Road of the necessary presence upon said Harbor Road of members of the train crew of said freight train, and particularly of plaintiff engaged in such switching movement, and to protect the members of said train crew, including plaintiff, against being injured by motor vehicles so using said highway.

At said time and place defendant Southern Pacific Company, by and through the members of its train and engine crew of said freight train, other than plaintiff, carelessly and negligently made said switching movement, and carelessly and negligently operated said freight train in said switching movement.

At said time and place defendant Pacific Portland Cement Company was negligently operating toward and upon said highway and toward plaintiff, a motor vehicle, to wit: a light pick-up truck bearing California license BC-8992 and drove carelessly and negligently the same with great force and violence upon plaintiff.

Said negligence of defendant Southern Pacific Company aforesaid, and the negligence of said Pacific Portland Cement Company aforesaid occurred simultaneously and concurrently, and by reason thereof plaintiff sustained the personal injuries hereinafter enumerated.

V.

Plaintiff so received severe physical injuries and endured extreme physical pain and grievous mental anguish. Said physical injuries, so far as are now known, are particularly, although not exclusively, as follows, to wit: A compound fracture of the left arm, fractures of the bones of the left shoulder, numerous broken ribs on the left side, and severe internal injuries.

VI.

Since said accident and injury plaintiff, by reason thereof, has been under the care of various physicians, surgeons and nurses; he has incurred, and will continue to incur, liability for hospital and medical services necessary to the treatment and relief of said injuries in amount and amounts not determined or ascertainable at this time; plaintiff here prays leave that when said amount and amounts are ascertainable he may be permitted to amend this complaint to insert the same herein.

VII.

Prior to said injuries plaintiff was a well and able-bodied man of 52 years of age and was earning and receiving from his employment with defendant a regular salary of approximately $350 per month. By reason of said injuries aforesaid plaintiff is now, and in the future will be, rendered incapable of performing his usual work or services, or any work or services whatsoever, all to the damage of plaintiff in the sum of $75,000.

As and for a Second, Separate and Distinct cause of action:

I.

At all times herein mentioned plaintiff was, and now is, a citizen of the State of Georgia, and defendant Pacific Portland Cement Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California.

The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

II.

Plaintiff realleges, excepting paragraph III thereof, paragraphs I to VII, inclusive, of the first cause of action as though fully set out herein.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of seventy-five thousand dollars ($75,000), and for costs of suit herein incurred.

/s/ HERBERT O. HEPPERLE,
Attorney for Plaintiff.

Trial by jury of all of the issues in the above-entitled action is hereby demanded.

/s/ HERBERT O. HEPPERLE,
Attorney for Plaintiff.

[Endorsed]: Filed June 7, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT PACIFIC PORTLAND CEMENT COMPANY TO COMPLAINT

Defendant, Pacific Portland Cement Company, for its answer to the complaint in the above-entitled action, admits, denies and alleges as follows:

As to First Alleged Cause of Action

I.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs I, II, III, V and VI of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every allegation contained in said paragraphs I, II, III, V, and VI.

II.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

"On or about April 4, 1949, at or about the hour of 5:35 P.M., plaintiff was regularly employed by defendant Southern Pacific Company as a brakeman of defendant Southern Pacific Company's

local freight train Extra No. 2345 West at said Station of Redwood City, California.

"At said Station of Redwood City the main-line track extends over the Bayshore Highway and in a sharp curve to the left toward and to the plant of the defendant Pacific Portland Cement Company. Said main-line track, on the outside curve thereof, is paralleled in close proximity thereto by a state highway known as the Redwood Harbor Road. Directly opposite said Harbor Road and across said main line, at an approximate distance of 75 feet from the intersection of said Bayshore Highway with said main line, is located a switch-stand of a spur track leading off of said main-line at said point and extending toward the right in a curved direction to the left.

"At said time and place said freight train, consisting of 16 freight cars and a caboose, tender and locomotive, had arrived at said station and said yards, and was engaged in doing station switching over said main-line track and said spur track, and it became and was the duty of plaintiff to take a position upon said Harbor Road directly opposite from said switch-stand.

"At said time and place defendant Southern Pacific Company carelessly and negligently failed to provide for plaintiff a safe place to work and did, on the contrary, carelessly and negligently maintain an unsafe and dangerous place for said plaintiff to work, among others, in the following respects: Said Harbor Road at said time and for a long

period of time prior thereto was heavily used and traveled, and known by defendant Southern Pacific to be so used and traveled by motor vehicles, passenger automobiles, and freight trucks. In such switching movement a portion of said freight train was upon the main-line track curving to the left with the engine moving the same in a back-up position. The purpose of the movement was to pull from said spur track said cars of said train, and as the same cleared the spur track, it was plaintiff's duty to throw the switch. Neither the engineer nor the fireman of said engine crew had any, or adequate, view of said Harbor Road, nor of motor vehicles using and traveling the same, coming in the direction from said Pacific Portland Cement Company plant. Defendant Southern Pacific Company negligently failed to provide any person to warn or means of warning, or notice to the operators of motor vehicles so traveling said Harbor Road of the necessary presence upon said Harbor Road of members of the train crew of said freight train, and particularly of plaintiff engaged in such switching movement, and to protect the members of said train crew, including plaintiff, against being injured by motor vehicles so using said highway.

"At said time and place defendant Southern Pacific Company, by and through the members of its train and engine crew of said freight train, other than plaintiff, carelessly and negligently made said switching movement, and carelessly and negligently

operated said freight train in said switching movement."

This defendant denies each and every part of the following allegations contained in paragraph IV of the first alleged cause of action of said complaint:

"At said time and place defendant Pacific Portland Cement Company was negligently operating toward and upon said highway and toward plaintiff, a motor vehicle, to wit: a light pick-up truck bearing California license BC-8992 and drove carelessly and negligently the same with great force and violence upon plaintiff.

"Said negligence of defendant Southern Pacific Company aforesaid, and the negligence of said Pacific Portland Cement Company aforesaid occurred simultaneously and concurrently, and by reason thereof plaintiff sustained the personal injuries hereinafter enumerated."

III.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph VII of the first alleged cause of action of said complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

"Prior to said injuries plaintiff was a well and able-bodied man of 52 years of age and was earning and receiving from his employment with defendant a regular salary of approximately $350 per month."

This defendant denies each and every part of the following allegations contained in paragraph VII of the first alleged cause of action of said complaint:

"By reason of said injuries aforesaid plaintiff is now, and in the future will be, rendered incapable of performing his usual work or services, or any work or services whatsoever, all to the damage of plaintiff in the sum of $75,000."

In this connection, however, this defendant denies that plaintiff has been injured or damaged in any manner or amount whatsoever by reason of any carelessness, or negligence, or act, or omission of this defendant, or of any servant, agent or employee of this defendant.

IV.

As and for a Further and Separate Defense, this defendant alleges that plaintiff himself was careless and negligent in and about the matters alleged in the first alleged cause of action of said complaint, and that said carelessness and negligence on said plaintiff's own part proximately contributed to the happening of the accident and to the injuries, loss and damage complained of, if any there were.

As to Second Alleged Cause of Action

I.

This defendant is without knowledge or information sufficient to form a belief as to the truth of any of the following allegations contained in paragraph I of the second alleged cause of action of said

complaint, and placing its denial thereof upon that ground, this defendant denies each and every part of the following allegations:

"At all times herein mentioned plaintiff was, and now is, a citizen of the State of Georgia, . . ."

II.

For its answer to paragraph II of the second alleged cause of action of said complaint, this defendant hereby repeats and makes a part hereof all of its foregoing denials, allegations, admissions and separate defense contained in its foregoing answer to paragraphs I, II, IV, V, VI and VII of the first alleged cause of action of said complaint.

Wherefore, this defendant prays that plaintiff take nothing herein, and that this defendant have judgment for its costs of suit herein incurred.

/s/ LEIGHTON M. BLEDSOE,
/s/ DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement Company.

Receipt of copy attached.

[Endorsed]: Filed July 21, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now, Southern Pacific Company, a corporation, a defendant above named, and answering

the complaint of plaintiff on file herein, and severally answering each alleged cause of action thereof, shows as follows:

I.

Admits the allegations of Paragraph I of the first alleged cause of action, and the same as incorporated in the second alleged cause of action, and further admits as follows:

On April 4, 1949, at about 5:35 p.m., plaintiff was employed by defendant Southern Pacific Company as a brakeman, working on defendant's freight train Extra No. 2345 West. Said train consisted of a locomotive engine and tender and seventeen cars, and was engaged in switching operations on the Paraffine Co. spur track at Redwood City, California. Said track was paralled to Harbor Road, a public street and highway in said city, and both said track and said road curved to the left. At said time and place plaintiff dropped off one of the cars of said train and stepped back onto said road. At said time a certain pickup truck owned by defendant Pacific Portland Cement Company, bearing California license COM. BC 8982, was being driven and operated on and along said Harbor Road. Said truck ran into and collided with plaintiff, and plaintiff was injured. At all times mentioned in the complaint and herein defendant Pacific Portland Cement Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of California.

II.

Defendant Southern Pacific Company has no knowledge or information sufficient to enable it to form a belief as to the truth of the allegations of the complaint in respect of the nature and extent of plaintiff's injuries, or his age and citizenship. Defendant Southern Pacific Company denies each and every allegation of the complaint, and of each of the alleged causes of action thereof, not hereinabove admitted or denied.

And for a Second, Separate and Independent Answer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion, plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said train and said road, and negligently performed his duties as a brakeman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, proximately caused and contributed to said accident, injuries and damages, if any, alleged by plaintiff.

And for a Third, Separate and Independent An-

swer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion, plaintiff was negligent in the premises and in those matters set forth in the complaint, and negligently conducted himself on and about and in respect of said train and said road, and negligently performed his duties as a brakeman, with the result that he was injured. Said conduct of plaintiff, as aforesaid, was the sole cause, and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

And for a Fourth, Separate and Independent Answer and Defense to the Complaint, defendant Southern Pacific Company shows as follows:

I.

Defendant here repeats and alleges all of the matters set forth in paragraph I of the first answer and defense above, and incorporates them herein by reference the same as though fully set forth at length. At said time and place and on said occasion defendant Pacific Portland Cement Company so negligently, carelessly, recklessly and unlawfully drove, operated, maintained and controlled said

truck as to cause the same to run into and collide with plaintiff. Said conduct of defendant Pacific Portland Cement Company, as aforesaid, was the sole cause, and the sole proximate cause of said accident, injuries and damages, if any, alleged by plaintiff.

Wherefore, defendant Southern Pacific Company, a corporation, prays that plaintiff take nothing by his complaint on file herein; that defendant have judgment for its costs of suit incurred herein; and for such other, further and different relief as, the premises considered, is proper.

/s/ A. B. DUNNE,
DUNNE & DUNNE,
Attorneys for Defendant Southern Pacific Company.

Affidavit of service by mail attached.

[Endorsed]: Filed August 16, 1949.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and against Defendant Pacific Portland Cement Co. and assess the damages against the Defendant in the sum of Fifteen Thousand ($15,000.00) Dollars.

/s/ GENE D. McCLAIN,
Foreman.

[Endorsed]: Filed November 9, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, and PACIFIC PORTLAND CEMENT COMPANY, a corporation,

Defendants.

JUDGMENT ON VERDICTS

This cause having come on regularly for trial on November 1, 1948, before the Court and a Jury of twelve persons duly impaneled and sworn to try the issues joined herein; Robert Hepperle, Esq. and Edward Digardi, Esq. appearing as attorneys for the plaintiff; Louis Phelps, Esq. appearing as attorney for the defendant Southern Pacific Company, and Leighton Bledso, Esq. appearing as attorney for the defendant Pacific Portland Cement Company, and the trial having been proceeded with on the 1st, 2nd, 3rd, 7th, 8th, and 9th days of November in said year, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the Jury and the Jury having subsequently rendered the following

verdicts, which were ordered recorded, viz.: "We, the Jury, find in favor of the Plaintiff and against Defendant Pacific Portland Cement Co. and assess the damages against the Defendant in the sum of Fifteen Thousand ($15,000.00) Dollars. Gene D. McClain, Foreman," and "We, the Jury, find in favor of the Defendant Southern Pacific Company. Gene D. McClain, Foreman," and the Court having ordered that judgment be entered herein in accordance with said verdicts and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiff do have and recover of and from said defendant Pacific Portland Cement Company the sum of Fifteen Thousand and no/100 Dollars ($15,000.00), together with his costs herein expended taxed at $96.99, and that plaintiff take nothing by this action as to defendant Southern Pacific Company; that said defendant Southern Pacific Company go hereof without *day,* and that said defendant Southern Pacific Company do have and recover of and from plaintiff its costs herein expended taxed at $33.60.

Dated: November 10, 1949.

/s/ C. W. CALBREATH,
Clerk.

Entered in Civil Docket Nov. 10, 1949.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

SEPARATE REQUEST FOR INSTRUCTIONS BY PACIFIC PORTLAND CEMENT COMPANY

Defendant's Instruction No. . .

It is the contention of defendant Pacific Portland Cement Company that the doctrine of leniency toward a workman in the street does not apply in this case.

(See: Lewis v. Southern California Edison Co., 116 Cal. App. 44;
Milton vs. L. A. Motor Coach Co., 53 Cal. App. (2d) 566)

If the Court decides to give instructions to the jury which recognize the application of that rule defendant Pacific Portland Cement Company requests that the following instructions be given:

1. The rule of law which the Court has given to you concerning a workman in the street or roadway does not mean that such a person is not bound to use ordinary care for his own safety.

State Compensation Insurance Fund vs. Scamell, 73 Cal. App. 285 at 291.

2. If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be

governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway.

Lewis v. Southern California Edison Co., 116 Cal. App. 44.

3. You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity.

Milton vs. L. A. Motor Coach Co., 53 Cal. App. (2d) 566.

4. If you find that the plaintiff was not forced to be or to remain in the place where he was injured on the roadway as a matter of duty, although he may have had a right to be there, and that his use of the roadway in the manner in which he used it at the time and place in question was a matter of choice and not a matter of necessity, then you are instructed that the plaintiff is not to be classed with laborers engaged in street work, and was, under such circumstances, required to exercise the ordinary care that is required of the ordinary pedestrian under such circumstances.

Milton vs. L. A. Motor Coatch Co. 53 Cal. App. (2d) 566 at 573.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED INSTRUCTIONS

The plaintiff requests the Court to give all of the following instructions and hereby moves that the same be given on submission of the above-entitled cause to the jury herein.

/s/ HERBERT O. HEPPERLE,
Attorney for Plaintiff.

Plaintiff's Requested Instruction No. 7

Each Participant Liable

When the negligent acts or omissions of two or more persons whether committed independently or in the course of jointly directed conduct contributed concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution.

Plaintiff's Requested Instruction No. 18

It is part of the duty of the operator of an automobile to keep his machine always under control so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others.

This rule of law applied to the defendant Pacific Portland Cement Company's driver in the operation of the automobile he was driving, and if you

believe from the evidence that at the time and immediately before the collision in question he did not keep the automobile under control so as to avoid colliding with the plaintiff lawfully using said highway, then I instruct you that, in that event, he was negligent.

Plaintiff's Requested Instruction No. 19

You are instructed that at the time of the accident there was in effect Section 510 of the California Motor Vehicle Code, providing:

"No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Under this statute it was one of the duties of the defendant Pacific Portland Cement Company's driver, in the exercise of reasonable care, to maintain a constant and vigilant lookout ahead for persons upon the highway and particularly those the performance of whose duties required them to be thereon.

If you find that the plaintiff, William A. Bellamy, was upon said highway in such position that defendant Pacific Portland Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, and that such failure proximately caused the accident and injury, then and in that event said driver was negligent, you will return your verdict in favor of plaintiff,

and in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight, for to look is to see and, in such circumstances, you must necessarily find that defendant's driver either failed to look, or having looked, did see the plaintiff in such position.

Plaintiff's Requested Instruction No. 24

While it is incumbent on plaintiff to prove his case by a preponderance of the evidence, the law does not require of the plaintiff proof amounting to demonstration or beyond a reasonable doubt. All that is required in order for plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT AND OF MOTION FOR NEW TRIAL

To the Plaintiff Above Named, and to Herbert O. Hepperle, His Attorney and to Defendant Southern Pacific Company, and to A. B. Dunne and Messrs. Dunne & Dunne, its attorneys:

You, and each of you, will please take notice that on Monday, the 28th day of November, 1949, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, or at any other time thereafter

fixed by the Court, the defendant Pacific Portland Cement Company, by its attorneys, will move the above entitled Court, the division thereof presided over by Honorable Herbert W. Erskine, at the courtroom of said court and division, United States Post Office Building, Seventh and Mission Streets, San Francisco, California, as follows:

I.

(1) For an order under and pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure, setting aside the verdict and judgment thereon heretofore entered in the above entitled action in favor of plaintiff and against defendant Pacific Portland Cement Company, and directing that said judgment be vacated and directing that judgment be entered in accordance with the motion of defendant Pacific Portland Cement Company for a directed verdict heretofore made. Attached hereto and marked Exhibit A and incorporated herein is the draft of the proposed order requested by this defendant.

(2) Said motion will be made upon this notice and upon all of the records, papers and files in the above entitled action, including the transcript of the testimony, all exhibits, and the proceedings had upon the trial of the above entitled cause, and upon the findings of the jury with reference to the defendant Southern Pacific Company.

(3) Said motion will be made on the ground that at the close of all the evidence the defendant Pacific Portland Cement Company made a motion

for a directed verdict, which should have been granted, but which was denied, and will be made upon all of the grounds heretofore stated as grounds for said motion for a directed verdict, and will be made upon the following grounds, and each of them:

(a) There was and is no evidence of any negligence on the part of defendant Pacific Portland Cement Company, or of any of its agents, servants or employees.

(b) There was and is no evidence of any negligence on the part of defendant Pacific Portland Cement Company or on the part of its agents, servants or employees, which was a proximate cause of any injury or damage to plaintiff.

(c) That it appears from the evidence introduced that the plaintiff was guilty of contributory negligence as a matter of law, and that said contributory negligence of the plaintiff proximately contributed to his injury and damage.

(d) That the evidence shows as a matter of law and without contradiction that the plaintiff failed to take the precautions required of an ordinarily prudent person under the circumstances existing at the time and place of the accident and negligently and carelessly failed to look in the direction from which danger was to be anticipated, and that said negligence and carelessness and failure to take the precautions of an ordinarily prudent person under the circumstances were, and each of them was, a proximate contributing cause to the injury and damage complained of by the plaintiff.

(e) That the Court has no jurisdiction of the

controversy as between plaintiff and defendant Pacific Portland Cement Company for the reason that a required diversity of citizenship did not at the time of the commencement of this action exist as between plaintiff and said defendant.

(f) That the plaintiff has failed as a matter of law to sustain his burden of proof with respect to diversity of citizenship as between him and defendant Pacific Portland Cement Company.

II.

(1) Defendant Pacific Portland Cement Company further and in the alternative will move the above entitled Court at the time and place hereinabove specified for an order under and pursuant to Rule 59 of the Federal Rules of Civil Procedure vacating and setting aside the verdict and judgment herein and granting to defendant Pacific Portland Cement Company a new trial. Attached hereto and marked Exhibit B and incorporated herein is a draft of the proposed order for new trial.

(2) Said motion will be made upon this notice of motion and upon all of the records, papers and files herein, including a transcript of the testimony and proceedings had upon the trial and the exhibits introduced in evidence, including the charge and instructions of the Court and the rulings of the Court on the instructions proposed by defendant Pacific Portland Cement Company, and upon the findings of the jury and its verdict with reference to the defendant Southern Pacific Company.

(3) Said motion will be made upon the following grounds, and each of them.

(a) That the plaintiff has failed to establish the required diversity of citizenship as between him and defendant Pacific Portland Cement Company.

(b) That the evidence shows that plaintiff at the time of the commencement of this action was a resident and citizen of the State of California, and the pleadings admit that the defendant Pacific Portland Cement Company was a resident and citizen of the State of California, and that there is no diversity of citizenship between said parties and no jurisdiction of said Court to hear the cause as between them.

(c) That the verdict is against the law.

(d) That the verdict is against the weight of evidence.

(e) That the verdict is contrary to the evidence.

(f) That the evidence is insufficient to sustain the verdict.

(g) Errors of law occurring at the trial and duly objected and excepted to and particularly in the giving of instructions requested by plaintiff and in the giving of general instructions by the Court, which were objected and excepted to and in the denial of defendant Pacific Portland Cement Company's proposed instructions to which denial said defendant duly objected and excepted, and rulings upon the admission of evidence.

(h) That the verdict of the jury in favor of defendant Southern Pacific Company establishes as

a finding of fact by the jury that the plaintiff was not required to be in the highway at the time and place he was when the accident occurred, and that none of the duties of plaintiff as a brakeman for Southern Pacific Company called for or required his being in the highway where he was at the time and place of the accident, and that by said verdict in favor of the Southern Pacific Company the issue of whether or not the plaintiff was entitled to the benefit and protection of the "workmen in the street" rule of law has been determined in favor of defendant Pacific Portland Cement Company, and plaintiff was contributorily negligent as a matter of law, and that the evidence establishes as a matter of law that plaintiff was negligent at the time and place of the accident, and that his negligence proximately contributed to the injury and damage complained of by him.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement Company.

Exhibit A

In the District Court of the United States for the Northern District of California, Southern Division.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

ORDER

Defendant Pacific Portland Cement Company, a corporation, having duly moved the above-entitled Court to vacate and set aside the judgment herein heretofore rendered in favor of plaintiff and against said defendant and having moved the Court to render and enter judgment in accordance with its motion for a directed verdict heretofore made, and the matter having been heard and submitted to the Court, and the parties having appeared upon the making and hearing of said motion, and the Court being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein be, and they are hereby vacated and set aside, and judgment against the plaintiff and in favor of defendant Pacific Portland

Cement Company, a corporation, be entered in accordance with defendant's motion for directed verdict heretofore made, and it is further

Ordered, Adjudged and Decreed that plaintiff take nothing herein and that defendant Pacific Portland Cement Company, a corporation, do have and recover its costs of suit herein.

Done in Open Court this .... day of ....., 1949.

....,
Judge of the United States
District Court.

Exhibit B

In the District Court of the United States for the Northern District of California, Southern Division.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

ORDER

Defendant Pacific Portland Cement Company, a corporation, having duly moved the above-entitled

Court to vacate and set aside the verdict and judgment herein and grant to said defendant Pacific Portland Cement Company, a corporation, a new trial, and the matter having been heard and submitted to the Court, and all of the parties having appeared upon the making and hearing of said motion, and the court having considered the same and being fully advised, it is hereby

Ordered, Adjudged and Decreed that the verdict and judgment herein in favor of plaintiff and against defendant Pacific Portland Cement Company, a corporation, be and they are hereby vacated and set aside, and a new trial of this action is hereby granted to defendant Pacific Portland Cement Company.

Done in Open Court this .... day of ....., 1949.

.....,
Judge of the United States
District Court.

Receipt of Copy acknowledged.

[Endorsed]: Filed Nov. 18, 1949.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 30th day of November, in the year of our Lord, one thousand nine hundred and forty-nine.

Present: The Honorable Herbert W. Erskine, District Judge.

[Title of Cause.]

ORDER DENYING DEFENDANT'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR FOR A NEW TRIAL

Defendant Pacific Portland Cement Company's motions for judgment notwithstanding the verdict, or for a new trial, heretofore having been argued and submitted to the Court for consideration and decision, now, due consideration having been had, it is Ordered that said motions be severally denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice is hereby given that defendant Pacific Portland Cement Company (a corporation) hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered of record in the office of the clerk of the above-entitled court on the 10th day of November, 1949, in favor of the plaintiff and against said defendant.

Said appeal is taken from the whole and each and every part of said judgment.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Notice is hereby given that the defendant and appellant Pacific Portland Cement Company (a corporation) does hereby designate the following portion of the record, proceedings and evidence to be contained in the record on appeal in this cause:

1. Complaint.

2. Answer of defendant Pacific Portland Cement Company to Complaint.

3. Answer of defendant Southern Pacific Company to Complaint.

4. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received in evidence, all motions and applications made during the trial and the rulings thereon.

5. The verdict of the Jury and Judgment entered thereon.

6. Motion of Defendant Pacific Portland Cement Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Minute order denying motion of defendant Pacific Portland Cement Company (a corporation) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

8. Instructions given by the Court.

9. Instructions proposed by defendant Pacific Portland Cement Company (a corporation) and refused by the Court.

10. Reporter's Transcript.

11. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

12. Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All other records required by the provisions of Rule 75, Subdivision (g), of the Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
DANA, BLEDSOE & SMITH,
Attorneys for Defendant Pacific Portland Cement Company.

Receipt of Copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

In the Southern Division of the United States District Court for the Northern District of California.

Before: Hon. Herbert W. Erskine,
Judge.

No. 28909-E

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, November 1, 1949

Appearances, for the Plaintiff:
HERBERT O. HEPPERLE, JR., ESQ., and
EDWARD M. DIGARDI, ESQ.

For Defendant Southern Pacific:
LOUIS L. PHELPS, ESQ.

For Defendant Pacific Portland Cement Company:
LEIGHTON BLEDSOE, ESQ.

(A jury was duly impanelled and sworn, and following opening statements by counsel for the respective parties, the following occurred:)

WILLIAM A. BELLAMY

called as a witness in his own behalf; sworn.

The Clerk: Will you state your name to the Court and jury?

A. William A. Bellamy.

Direct Examination

By Mr. Digardi:

Q. How old are you, Mr. Bellamy?

A. 52 years old.

Q. And where do you live?

A. I have a room at 179 Jessie Street, San Francisco.

Q. Where is your home, Mr. Bellamy?

A. My home is in Carnesville, Georgia.

Q. Where were you born, Mr. Bellamy?

A. Carnesville, Georgia.

Q. When did you first come to California?

A. I came to California in the year of 1942.

Q. What was the occasion for your coming to California?

A. I came out here in the army.

Q. And——

Mr. Bledsoe: Objected to as incompetent, irrelevant and immaterial.

The Court: This is only preliminary.

Mr. Digardi: If Your Honor please, this is merely to show domicile.

The Court: I will allow it. [2*]

Q. (By Mr. Digardi): Will you answer the question, please?

*** Page numbering appearing at top of page of original certified Transcript of Record.**

(Testimony of William A. Bellamy.)

A. I came out here in the army.

Q. How long were you in the army, Mr. Bellamy? A. Well, about——

Mr. Bledsoe: Same objection: incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Digardi: Answer the question, please.

A. Something over seven months.

Q. Were you discharged from the army?

A. Yes, sir.

Q. What was the reason for your discharge from the army? A. Over age.

Mr. Phelps: Objected to as incompetent—Go ahead.

Mr. Digardi: Mr. Clerk, will you mark this?

(Thereupon photostat of document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Digardi): Mr. Bellamy, while counsel is examining the document, I can proceed with some other questions. Mr. Bellamy, have you always lived all of your life in Carnesville, Georgia?

A. Yes, sir, except a short while at the time—I have been out of there.

Q. Have you always maintained your permanent home in Carnesville, Georgia? [3]

A. Yes, sir.

Q. Now, you stated that you were discharged from the army because of over-age. Did the army

(Testimony of William A. Bellamy.)

have any provision or regulation concerning your discharge? Was there any prerequisite to your being discharged from the army?

A. In order to be released from the army, you had to have shown that you had employment in some industry there, that they had——

Q. Did you make such a showing to the army?

A. Yes, sir.

Q. And by whom were you employed?

A. Southern Pacific.

Q. And when did you first start your employment with the Southern Pacific Company?

A. The 11th of September, 1943.

Q. When you first took employment with the Southern Pacific Company, at that time did you intend to establish permanent residence in California? A. No, sir.

Q. What was your intention?

A. Intention was going back to Georgia.

Q. Now, when the war ended, did you continue to work for the Southern Pacific Company?

A. Yes, sir.

Q. And did you work for the Southern Pacific Company up until [4] the time of the accident here?

A. Yes, sir.

Q. Had your intention ever been to establish a permanent residence in California?

A. No, sir.

Q. Have you ever voted in California?

A. No.

(Testimony of William A. Bellamy.)

Q. Mr. Bellamy, have you maintained in Carnesville, Georgia, connections with any organizations, lodges or the like? A. Yes, sir.

Q. Will you state what lodge that is?

Mr. Bledsoe: We will object to it as incompetent, irrelevant and immaterial. I don't see the——

Mr. Digardi: In order to show permanent—this is merely on the point of his domicile, Your Honor.

Mr. Bledsoe: The identity of the lodge, if the Court please, certainly shouldn't have any bearing on that.

The Court: Is there a question here about the diversity of citizenship?

Mr. Digardi: There is, Your Honor; defendant Pacific Portland Cement denied this.

The Court: The man's domicile?

Mr. Digardi: Yes, Your Honor.

The Court: I will allow the question.

Q. (By Mr. Digardi): Mr. Bellamy, do you have with you a card [5] showing your connection with any lodge organization in Georgia?

A. Yes, sir (producing).

(Document examined by Mr. Bledsoe.)

Mr. Bledsoe: I don't feel that the identity of the lodge, if the Court please, makes any difference. If he belongs to a lodge, that is the end of it.

Mr. Phelps: I don't see the materiality of it.

Mr. Digardi: Well, there is none, as to the Southern Pacific Company.

(Testimony of William A. Bellamy.)

The Court: Let me see that.

Mr. Digardi: It merely shows a paid-up membership through 1950, Your Honor. Your Honor, we might stipulate——

The Court: Oh, I don't think that the identity of the particular lodge is important, but it is a national order, isn't it?

Mr. Digardi: Yes, it is.

The Court: I think the fact that the date up to which his dues are paid is relevant, so I will admit the contents of this card so far as they show that. I can make the statement myself, that he paid, apparently, his dues up to October 31, 1950 in a lodge of a national order, fraternity, in Toccoa, Georgia.

Mr. Digardi: Thank you, Your Honor. I think that will be satisfactory. Could we withdraw this, then, so he won't lose it? [6]

The Court: Yes.

Q. (By Mr. Digardi): Mr. Bellamy, when you were discharged from the army, were you returned pursuant to the provisions of the Selective Service Act to the jurisdiction of a particular Selective Service board?

Mr. Phelps: Objected to as calling for the conclusion of the witness; he is asking for jurisdiction and asking him to interpret laws and everything else.

The Court: Well, I think that is too broad.

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Well, do you have with you a draft card, Mr. Bellamy?

A. Yes (producing).

Mr. Digardi: Will you mark this for identification, Mr. Clerk?

(Thereupon Selective Service registration card referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Digardi): Mr. Bellamy, when did you first join with the fraternal organization that was mentioned in the card that you had?

A. I don't remember the exact date. It has been twelve or more years ago.

Q. Have you maintained a membership in that organization continuously until the present time?

A. Yes, sir.

Mr. Digardi: If Your Honor please, we offer in evidence [7] Plaintiff's discharge from the army—We offer to show that he was inducted into the army and was discharged in California and discharged——

Mr. Bledsoe: Well, if that is all it is offered for, I will stipulate that that is what it proves.

Mr. Digardi: And that he was discharged for the convenience of the government, stated reason being over age 38; that is the only purpose.

The Court: Will you stipulate to that, too?

Mr. Bledsoe: Yes, Your Honor.

The Court: Well, those facts are now stipulated to, so there is no need for this.

(Testimony of William A. Bellamy.)

Mr. Digardi: We will accept the stipulation, Your Honor.

The Court: It is 12:00 o'clock so we will now take the recess until 2:00 o'clock.

Mr. Digardi: Thank you, Your Honor.

The Court: Ladies and gentlemen, before we recess will you bear in mind the admonition that the Court has heretofore given you. We will now recess this case until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p.m.) [8]

Monday, November 1, 1949, 2:00 o'clock

WILLIAM A. BELLAMY

resumed the stand in his own behalf.

Direct Examination
(Continued)

By Mr. Digardi:

We offer in evidence, Your Honor, Plaintiff's Exhibit No. 5 for identification which is a Selective Service card of Mr. Bellamy. The Selective Service card indicates on one side local board No. 1, Franklin County, Georgia, November 11, 1944. On the reverse side notice of classification, William Adolphus Bellamy, order No. 10270, has been classified in Class 1-C (discharged) by local board. Then there is an X in the square marked "Local Board" dated November 11, 1944, M. A. Davis, member of local board.

(Testimony of William A. Bellamy.)

(Thereupon Plaintiff's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Digardi): Mr. Bellamy, at the time of this accident, by whom were you employed?

A. Southern Pacific Railroad.

Q. In what capacity? A. Brakeman.

Q. Mr. Bellamy, will you briefly tell us what type of work you did as a brakeman?

A. Freight work, picking up, setting out cars, switching cars in the yard. [9]

Q. Did you work on through freights?

A. Some, some local freights.

Q. And some local freights?

A. Mixed freight, yes.

Q. Mr. Bellamy, do you know of your own knowledge where those freight cars came from and where they went, the cars that you switched and handled in your train?

Mr. Phelps: Counsel, if your purpose is to establish interstate commerce, I will stipulate that he was engaged in interstate commerce at the time of the accident and received his injury at that time in the course and scope of his employment.

Mr. Digardi: Thank you, that was our purpose.

Q. Now, Mr. Bellamy, prior to this accident, what was the state of your health?

A. Good.

Q. Had you passed physical examination prior to your entry into the army? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Was your service limited or general service in the army? A. General service.

Q. Now, getting to the date of the accident, do you recall what date that was?

A. The day of the accident?

Q. Yes. [10] A. April 4th.

Q. Of 1949? A. 1949, yes, sir.

Q. What time did you go to work that day?

A. The job was supposed to leave at 4:00 o'clock. I believe it was called, I believe I was called on duty at 3:30. I believe that is when I went to work.

Q. And where did you go to work?

A. Bayshore yards.

Q. Bayshore yards? A. Yes, sir.

Q. Here in San Francisco?

A. San Francisco.

Q. And where was the destination of your train?

A. Redwood City.

Q. And did it have a particular number, that train, or a job number?

A. This was an extra job just put on. It had a number, but, really, I don't know.

Q. Was it a local freight?

A. Local freight, yes, sir.

Q. And you went to work at 3:30, approximately? A. Yes, sir.

Q. Where did the train proceed from Bayshore?

A. To Redwood City. [11]

Q. Do you recall how many cars there were in the train, just roughly?

(Testimony of William A. Bellamy.)

A. No, sir, I do not.

Q. When you arrived in Redwood City, what did you do?

A. We had some work to do there in Redwood City yards, so we switched out our train there in the Redwood City yards.

Q. When you say you had work to do, what did that work consist of?

A. It consisted of switching out some cars and picking up some cars to go to the cement plant.

Q. In other words, you were taking cars out of your train and leaving them there and picking up other cars from the yard in Redwood City and putting them into your train, is that correct?

A. Mostly picking up cars at Redwood City yard and taking them to the harbor.

Q. I see. When—Then after you left Redwood City, where did you go then?

A. We had headed for what they call the harbor.

Q. That is, Redwood City harbor?

A. Yes, sir.

Q. Who were the other members of the train crew?

A. George Lechner was the conductor and Paul Husson and Joe Quinlan, two brakemen.

Q. And you were yourself a brakeman?

A. Brakeman, yes, sir. [12]

Q. Do you know who the engine crew were?

A. I understand Frank Edwards was the engineer; and so far as the fireman, I couldn't say.

(Testimony of William A. Bellamy.)

Q. You then proceeded toward Redwood City harbor? A. Yes, sir.

Q. In what direction is that from Redwood City? A. That would be east, I guess.

Q. Now, Mr. Bellamy, when you arrived at the Bayshore Highway, was there any cut made in your train at that time?

A. On our way to the harbor?

Q. On your way to the harbor.

A. Yes, sir.

Q. And will you describe what you did at that point?

A. We stopped back of the Bayshore Highway and left our main train and a cut and went to the asbestos plant.

Mr. Digardi: Now, Mr. Clerk, I think we might mark these two maps as the next two exhibits. We probably need them marked separately, so we can refer to them.

The Clerk: The first map you used this morning is marked Plaintiff's Exhibit No. 6 for identification—Are you offering them in evidence?

Mr. Digardi: We might as well have them in evidence.

The Court: Any objection?

Mr. Bledsoe: No objection, Your Honor.

Mr. Phelps: No objection. [13]

The Court: They may be admitted in evidence.

The Clerk: The second chart you have on the

(Testimony of William A. Bellamy.)

board now is marked Plaintiff's Exhibit 7 in evidence.

(Thereupon the two charts on blackboard of purported location of accident were received in evidence and marked Plaintiff's Exhibits 6 and 7 in evidence.)

Q. (By Mr. Digardi): Calling your attention to Plaintiff's Exhibit No. 6, Mr. Bellamy, I assume the directions are roughly the same as on this—north is at the top of the map, roughly, south on the bottom, west to my lefthand side facing the map and east to the right. Now, would you indicate where Bayshore Highway is on this? It is not shown, but where would Bayshore Highway be?

A. It would be to the left of it.

Q. So Bayshore Highway would be out in this direction, is that correct? A. Yes, sir.

Q. To the west of this map? A. Yes, sir.

Q. And it is indicated, this is the line of the railroad running through here—Has this got any particular name? Is this the main line or what, Mr. Bellamy?

A. Well, you call that the main line to the harbor.

Q. Shall we mark on here "main line to harbor"?

And now, Mr. Bellamy, there is indicated a switch and a spur [14] track leading off of the main line. What is that switch, what is that spur track?

(Testimony of William A. Bellamy.)

A. That spur track goes into a little asbestos plant.

Q. Is that what is known as the paraffine spur?

A. Down in the Paraffine spur.

Q. Now, as you were coming in with your train, you stated you left the main body of the train on the west side of Bayshore Highway. Now where did your train, the remaining part of the train, proceed then?

A. The engine and the cars, we had to proceed toward the asbestos plant, the paraffine spur.

Q. Now, do you recall what cars there were and in their order as they came into the asbestos spur, starting from the east end of the train and going to the west?

A. In going in, we had one car ahead of the engine and a couple of cars to the rear of the engine.

Q. So then on this track as you came in, there was a car ahead of the engine, the engine, tender and two or three cars to the rear of the engine, is that correct? A. Yes, sir.

Q. Now, as you proceeded into the paraffine spur, what did you do? Not you personally, but what was the movement that was made there?

A. In going in there, we was to go in and pick up some cars that was supposed to come out and leave this one car we had [15] ahead of the engine.

Q. And in doing that, what was the maneuver to be made by the train? You first stated you went

(Testimony of William A. Bellamy.)

in and you picked up these two cars. Now, what do you mean by "picked up"?

A. We caught ahold of them and pulled them out.

Q. In other words, you coupled onto the two cars that were in with the cars that were already ahead of the engine, is that correct?

A. Yes, that's right.

Q. And then after you had coupled onto the cars, what was the movement to be made?

A. We was to pull out of the spur and shove the ones we just picked up on the main line and go back in and spot up the ones supposed to be left in there.

Q. Now, see if I am correct. You were coming in in this direction, from the west toward the east, with a train which consisted of one car ahead of the engine, the engine and two cars to the rear of the engine; and you were to come up the main line and into the paraffine spur. There you coupled onto two cars, on the head of the engine and were proceeding to back out. Your purpose being, when you cleared the switch, to shove down the main line, disconnected those cars, back up and go in and leave the one car that was ahead of the engine in the paraffine spur, is that correct?

A. The one car, one of the cars that we just brought out was [16] supposed to go back. That was my understanding.

(Testimony of William A. Bellamy.)

Q. Now, Mr. Bellamy, at what point—did you complete the maneuver?

A. No, sir, it hadn't been completed yet.

Q. On what movement of the train was it that you were injured? Which way was the train moving?

A. It was moving toward Redwood City. That would be to the west on your map.

Q. Were you coming out of the spur?

A. Coming out of the spur.

Q. Now, where were you riding on that movement?

A. I was riding the car ahead of the engine.

Q. That is, the car to the east of the engine?

A. Yes, sir.

Q. What position had you taken on that car?

A. I had just caught the first step of the ladder and just hanging on the side of the car.

Q. And the car was backing, and the train was backing toward the west? A. Yes, sir.

Q. Now, what was your particular duty? You were which brakeman on the job?

A. I was what we call the head brakeman.

Q. And were you also what is known as the "pin puller"? A. Yes, sir. [17]

Q. Now, what was your particular job to do in respect of this maneuver?

A. My job was to work between the engineer and the crew, work between them.

Q. Now, when the car backed out, the train

(Testimony of William A. Bellamy.)

backed out onto the main line, what were your duties at that time?

A. My duties, to look for signals and after the cut of cars passed over the switch, to line the switch for the movement.

Q. In other words, when the train cleared this switch, you were to reline it for the main line, is that correct? A. Yes, sir.

Q. Now, Mr. Bellamy, did you drop off of that cut or leave the car and go onto the ground?

A. Yes, sir.

Q. Could you indicate on this map, Plaintiff's Exhibit No. 6, approximately where you dropped off the train? A. Approximately, yes.

Q. Will you step down and do so? I have a pencil here. You can indicate.

A. Just the intersection there, so along in here somewhere I dropped off, down in between here and here (indicating).

Q. Would this be approximately the indication? We will mark this spot with an X and mark it B-1.

A. Somewhere around there.

Mr. Phelps: May the record show that the witness is again [18] noticing to his counsel a little bit more to the right, as well as at the point where his counsel placed the X on the map, which would be a little bit more east.

Q. (By Mr. Digardi): Does that spot approximately indicate where you dropped off the train?

A. Approximately.

(Testimony of William A. Bellamy.)

Q. Thank you. You may resume the witness stand. Now, Mr. Bellamy, after you dropped off the train—well, first, before you dropped off the train, did you look in any direction?

A. Yes, sir.

Q. Which directions did you look?

A. I looked facing the crew—I was facing the crew, and coming out and I was looking toward the east.

Q. You were looking toward the east and then what happened?

A. Left the car and stepped over in the highway and was moving toward the switch.

Q. In what direction were you facing while you were moving toward the switch?

A. I was facing the engineer and facing the engine.

Q. In other words, your back was to the west?

Mr. Phelps: To the east.

Q. (By Mr. Digardi): Your back was to the east? A. After I left the cars.

Q. And were you on the highway or otherwise?

A. I was on the highway. [19]

Q. About how far from the edge of the railroad tracks were you into the highway?

Mr. Phelps: At what time, now?

Mr. Digardi: Immediately after he dropped off, he stated he crossed over the tracks onto the highway.

Mr. Phelps: Well, do you mean when he first got

(Testimony of William A. Bellamy.)
onto the highway how close was he to the edge?

Mr. Digardi: Would you repeat the original question, Mr. Reporter?

(Question read.)

Mr. Phelps: I say the question is unintelligible. What time?

Mr. Digardi: I will withdraw the question.

The Court: Yes, reframe it.

Q. (By Mr. Digardi): Mr. Bellamy, will you describe in your own words what happened after you left, dropped off the car?

A. I dropped off the car and was facing the engineer, I went over into the highway, I had been there only a short while when I was struck down by the car, whatever hit me.

Q. Do you know how far you were into the highway at the time you were struck?

A. I couldn't say for exact.

Q. Could you give your best estimate as to how far away you were from the side of the train at the time you were struck?

A. Approximately six, seven feet—six, seven, eight feet, six [20] feet.

Q. Six feet is your best estimate?

Mr. Phelps: Well, I will submit that is leading. The witness has said six, seven or eight. The objection is made on that ground.

Q. (By Mr. Digardi): Now, Mr. Bellamy, did you have any warning that you were about to be

(Testimony of William A. Bellamy.)

struck before you were struck? A. No, sir.

Q. Do you know of your own knowledge what hit you? A. No, sir.

Q. Will you tell us where you were struck, what part of your body was struck?

A. Well, I was struck from the rear on the shoulder and side.

Q. On the left side, indicating?

A. Yes, sir.

Q. And what happened then?

A. I was struck down and afterwards took to the hospital.

Q. Now, Mr. Bellamy, are you familiar with the rules of the operating department of the Southern Pacific Company? A. Yes, sir.

(Conversation among counsel out of hearing of Reporter.)

Q. (By Mr. Digardi): Mr. Bellamy, at the time you were injured, were you conducting the movements in accordance with your regular duties?

Mr. Phelps: Objected to as calling for the conclusion of the [21] witness, if Your Honor please.

Mr. Bledsoe: We join in that objection, opinion and conclusions.

The Court: I think so. Better reframe the question.

Q. (By Mr. Digardi): Mr. Bellamy, are you familiar with the rules of the railroad company with respect to the operation of trains in switching movements?

(Testimony of William A. Bellamy.)

Mr. Phelps: It has been asked and answered.

A. Yes, sir.

Q. (By Mr. Digardi): Are you familiar with the custom and practice followed by the railroad in carrying out switching movements such as the one we are involved in here?

Mr. Bledsoe: Well, object to that on the ground it is not binding on our defendant, if the Court please, in any event.

The Court: Well, I will admit the testimony in so far as the defendant Southern Pacific is concerned.

Mr. Phelps: We object, if Your Honor please, on the ground that is incompetent, irrelevant and immaterial what the custom and practice was. The question was, What was being done on this particular occasion by this man.

Mr. Digardi: My purpose, Your Honor, is to show that he was carrying out his duties in accordance with the custom and practice and therefore it will be necessary to show that he was familiar, to qualify him, with what the custom and practice was. [22]

Mr. Phelps: Then we will broaden the objection to state that—or enlarge upon the objection—that he is asking the witness to express an opinion as to what he was doing, whether he was doing it properly and so forth, which is a matter for the jury; and also calling for his opinion and conclusion.

(Testimony of William A. Bellamy.)

Mr. Digardi: If Your Honor please, this man—I am qualifying him now as an expert on that subject, and his opinion would be competent and relevant and material.

The Court: Well, I don't think it is necessary for you to go that far. You can ask him what the custom and practice was and then ask him what he was doing.

Mr. Digardi: Thank you, Your Honor.

Q. Mr. Bellamy, what was the custom and practice of the head brakeman in such a movement as this?

Mr. Bledsoe: We will make the same objection to this line of questioning, as not being binding upon my defendant.

The Court: Well——

Mr. Phelps: And we want to note, if Your Honor please, the objection that it is incompetent, irrelevant and immaterial as to what the custom and practice of other people were unless there is——

The Court: Well, I have overruled that objection before; I will overrule it a second time. Let's go ahead now.

Q. (By Mr. Digardi): Will you answer the question, Mr. Bellamy?

A. Could you repeat the question? [23]

Q. What is the custom and practice of the head brakeman—I will reframe the question.

What are the duties of the head brakeman in such a switching operation?

(Testimony of William A. Bellamy.)

Mr. Phelps: Well, now, I will have to object. That is another question and is calling for the opinion and conclusion of the witness as to what his duties were. The other question is as to custom and practice. Your Honor has ruled on that.

The Court: I will overrule that one, too. So go ahead.

Q. (By Mr. Digardi): What is the duty of the head brakeman with respect to such a switching movement?

A. The duty of the head brakeman is to work between the engineer and the crew, pass signals from the rear end to the engineer, and align the switch after the car has gone over, the last switch. The switch would be the head brakeman's——

Q. Mr. Bellamy, in order to pass signals to and from the engineer and to and from the other trainmen, where had you in this particular instance, where were you required to take a position?

Mr. Phelps: Object, if Your Honor please, that that is without foundation. He has included in the question "pass to and from." There is no evidence of any necessity of passing a signal from the engineer to the crew. His testimony, exactly, was "from the rear end to the engineer."

The Court: Well, I think you ought to lay more of a [24] foundation.

Mr. Phelps: It is without foundation, it is too broad.

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Mr. Bellamy, is the track here straight or curved? A. Curved.

Q. Was it possible with such a curve as this for the engineer to see the man on the rear end of the cut?

Mr. Bledsoe: Objected to as calling for his opinion and conclusion; he wouldn't know what the engineer could or couldn't see.

Mr. Phelps: Same objection.

The Court: Better reframe that and ask him what was possible for him to see.

Q. (By Mr. Digardi): Mr. Bellamy, from your position when you were on the side of the car before you dropped off, were you able to keep in view both the engineer and the men on the rear end of the cut? A. No, sir.

Q. And in order to keep them in view, what did you do?

Mr. Bledsoe: We will object to that as leading and suggestive at to why he did something.

Mr. Phelps: Same objection, if Your Honor please. What he did is important.

Mr. Digardi: That is what I asked him, what he did.

The Court: That is just what he asked him—in order to do [25] that, what did you do? is the question. I will overrule it. Proceed.

Q. (By Mr. Digardi): What did you do, Mr. Bellamy?

A. I got on the ground in order to be where I

(Testimony of William A. Bellamy.)
could move at a distance, where I could have both crews in view.

Q. Could you have taken any other position and still have seen both the engineer and the men on the rear end and passed signals? A. No, sir.

Mr. Bledsoe: Same objection; calling for the opinion and conclusion.

Mr. Phelps: Same objection.

The Court: I will overrule the objection.

Q. (By Mr. Digardi): Will you answer the question? A. No, sir.

Q. Mr. Bellamy, at the point where you crossed over onto the highway, what is the situation with respect to how far the road comes up to the railroad track?

A. The road comes up to the track—it is a road all the way up to the track.

Mr. Phelps: There will be an objection, if I may state it, to these rules. It is without foundation at the present time, if Your Honor please. Much of it is immaterial, nothing to do with this. What are you particularly interested in? Show me what you want. [26]

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

Mr. Phelps: All right, no objection to that.

(Further conversation among counsel.)

Mr. Phelps: Well, I would have an objection to that part, but I will have no objection to the first,

(Testimony of William A. Bellamy.)

if you want to read it. Then I will state my objection to this.

Mr. Digardi: First I would like to read Rule 7-A of the Rules and Regulations of the Transportation Department of the Southern Pacific Company.

Mr. Bledsoe: May it be understood that these rules are not binding on the defendant Pacific Portland Cement, Your Honor?

The Court: Yes, that is correct.

Mr. Digardi: Rule 7-A:

"When practicable, all signals by hand must be given on the engineer's side."

And then there is some further part of the rule which is not applicable to this situation.

Mr. Phelps: And then if I may show the Court —perhaps that would be best—so I may make my objection to the part he now reads. May I do that and approach the bench?

The Court: Yes.

(Conversation among Court, Messrs. Digardi and Phelps at the bench, out of hearing of Reporter.)

The Court: I have seen that. Now, you may state what that [27] is for the record.

Mr. Phelps: If Your Honor please, for the record I would like to state an objection to the portion of Rule 7-B which counsel proposes to read, which is the last sentence of the second paragraph of Rule 7-B on page 13. The objection is that it is

(Testimony of William A. Bellamy.)
without foundation at this time; that it, by its terms, can only apply where signals are being given by the man at the particular time. There is no evidence that this man at this time was giving any signals or that there weren't also signals being given by someone else and that this rule does not apply unless all men from whom signals are given disappear from view.

The Court: Well, you say it is without foundation. You don't make any point that that particular rule to which you are now objecting, to the introduction into evidence of which you are objecting, is part of the rules?

Mr. Phelps: Oh, no, Your Honor, certainly. It is just without foundation and not applicable under the present state of the evidence.

The Court: Well, I will admit it.

Mr. Bledsoe: Yes, Your Honor.

Mr. Digardi: This is Rule 7-B, the Rules and Regulations of the Transportation Department of the Southern Pacific Company. And I am reading the last sentence in the second paragraph of the rules: [28]

"In backing a train or cars or shoving cars ahead of engine, the disappearance from view of trainmen or lights by which signals are given will be construed as a stop signal."

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

(Testimony of William A. Bellamy.)

Mr. Phelps: Again, I don't think it is applicable, but I won't even make an objection. Go ahead.

Mr. Digardi: This is the last paragraph, Rule 104-C, of the Rules and Regulations of the Transportation Department of the Southern Pacific Company:

"An employee alighting from a moving train to change position of a switch behind such train must get off rear of car when practicable, or when not practicable, on opposite side of track from switch stand unless it is unsafe to do so. While a train is moving over a switch, any employee in the vicinity of such switch must take position on opposite side of track from switch stand when practicable, and when not practicable to do so, must take position not less than 20 feet from the switch stand."

Q. (By Mr. Digardi): Now, Mr. Bellamy, I am pointing to Plaintiff's Exhibit No. 6. There is indicated on there "switch." Is that the location of the switch stand and the switch that you were intending to line after the train had passed over?

A. Yes, sir. [29]

Q. Now, Mr. Bellamy, when you were struck by this truck, were you rendered unconscious?

A. No, sir, I would say not.

Q. What was your condition?

A. Well, I was very much dazed and I was in a lot of pain.

Q. Were you bleeding or otherwise?

A. Yes, sir, I was bleeding.

(Testimony of William A. Bellamy.)

Q. Where were you bleeding from, what part of your body? A. From the arm.

Q. And will you describe what your condition was generally as you were lying there?

A. Well, I was very much dazed and in a lot of pain in so far as—I was unable to move very much and I wasn't allowed to move very much. The crew wouldn't let me move.

Q. Do you recall how long you lay there?

A. Not very long, I don't think.

Q. Were you taken away? A. Yes, sir.

Q. How were you taken away?

A. In the ambulance.

Q. And where were you taken?

A. To the Redwood—to the Palo Alto Hospital in Redwood.

Q. Palo Alto Hospital in Redwood City?

A. I believe that is the name of it, yes, sir.

Q. Did you stay there long? [30]

A. Not very long.

Q. About how long?

A. Well, it would be hard to estimate. A couple or three hours, I would say.

Q. What was done for you there?

A. It may have been a tourniquet put on the arm and examined, was the biggest thing.

Q. Where were you taken from there?

A. Southern Pacific Hospital in San Francisco.

Q. And what was your condition when you arrived there, Mr. Bellamy?

(Testimony of William A. Bellamy.)

A. Well, I was in very bad condition when I arrived at the Southern Pacific Hospital. They was —was unable to move myself.

Q. How were you taken there from Redwood City? A. In an ambulance.

Q. What was done for you when you arrived there?

A. Shortly after I arrived there, I had an operation on the arm. I was put to sleep and that is about as far as I remember that night.

Q. And what is the next thing you remember?

A. It was the next day some time, there in the hospital. But so far as that night, I was put to sleep and operated on my arm.

Q. Were you subsequently prepared for a further operation? A. Yes, sir. [31]

Q. Were you taken to the operating room?

A. Yes, sir.

Q. How far did that operation progress?

A. The anesthetic—I had had the anesthetic, but I had never been knocked out, put to sleep, so the doctor came in, examined me, and says, "There's a man not able to take the operation——"

Mr. Phelps: Well, if Your Honor please, no statement of the doctor should be in.

The Court: Yes, the statement of what the doctor said may go out. The jury is instructed to disregard it.

Q. (By Mr. Digardi): Were you operated on at that time? A. No, sir.

(Testimony of William A. Bellamy.)

Q. What was done for you?

A. I was then carried back to my bed in the room.

Q. Were X-rays taken of you during the first few days you were in the hospital?

A. Yes, sir, I had several different X-rays.

Q. Subsequently were you put in some kind of a cast or bandage of some type?

A. Yes, sir, what they call a Figure 8, in the hospital.

Q. How long did you remain in the hospital on that occasion?

A. Near three and a half weeks.

Q. And at the end of the three and a half weeks, what was done with you?

A. I came to my room at the end of three and a half weeks, and [32] I was in my room.

Q. What was your condition at that time?

A. I was wearing the Figure 8 and I was still having a lot of pain, and I had a lot of trouble sleeping at nights.

Q. What did you do, were you able to be up and walk around? A. I could be up, yes, sir.

Q. Did you go out to eat meals or did you eat them in your room?

A. I could go out to get my meals.

Q. How long did this continue?

A. Approximately six weeks, I would say.

Q. At the end of six weeks, what did you do?

A. I went back to the hospital.

(Testimony of William A. Bellamy.)

Q. What was done for you at that time?

A. The Figure 8 removed.

Mr. Digardi: Would you mark these?

(Documents marked for identification by the Clerk.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 8 for identification and ask you who does that picture show. A. That shows myself.

Q. And will you tell us what it shows?

A. It shows a laceration on the arm, it shows a Figure 8 bandage.

Q. It shows that. I show you Plaintiff's Exhibit 9 for identification and ask you what that photograph shows. [33]

A. That shows a Figure 8, also the arm.

Q. I show you Plaintiff's Exhibit 10 for identification and ask you the same question.

A. That shows the Figure 8.

Q. And Plaintiff's Exhibit 11?

A. That shows a Figure 8.

Q. And Plaintiff's Exhibit 12 for identification?

A. That shows a cut on the arm and Figure 8.

Mr. Digardi: We offer in evidence Plaintiff's Exhibits 8 through 12, inclusive, Your Honor.

The Court: Any objection?

Mr. Phelps: No objection.

Mr. Bledsoe: No objection.

Mr. Digardi: I would like to show them around and pass them to the jury.

(Testimony of William A. Bellamy.)

(Thereupon Plaintiff's Exhibits No. 8 to 12, previously marked for identification, being photographs of plaintiff, were received in evidence and passed to the jury for examination.)

Q. (By Mr. Digardi): Mr. Bellamy, with respect to the laceration on your arm, was that a deep or a superficial wound?

A. It was a deep wound.

Q. Now, after the Figure 8 was removed from your arm and shoulder, what was done for you?

A. I am back to me room and reported to the hospital for physiotherapy treatment after [34] that.

Q. For how long a period were you given physiotherapy treatments?

A. Six weeks, approximately.

Q. Will you describe briefly what that treatment consisted of?

A. Consisted of heat and massages.

Q. At the end of the six weeks' treatment, what was done—six weeks' physiotherapy, what was done? A. Not anything more after that.

Q. Have you received any further treatment from the Southern Pacific Hospital?

A. No, sir.

Q. Have you been discharged from the hospital?

A. No, sir.

Q. Have you returned to the hospital on various occasions since the termination of the physiotherapy treatment?

(Testimony of William A. Bellamy.)

A. I reported twice—once every two weeks up until the last two months. I have got a month leave at the time, the last two months.

Q. Are you on leave since and at the present time from the hospital? A. Yes, sir.

Q. Mr. Bellamy, what is your present condition? Let's begin with your arm. Will you describe the condition of your left arm at the present time?

A. This arm is very weak and nervous and numb feeling on this [35] part of the arm from the laceration down (indicating).

Mr. Digardi: He is indicating the upper side of the left forearm from the point of the laceration down.

Q. What is the condition of your left arm with respect to ability to move it up and down at the shoulder joint?

A. I have a limited motion of the arm and shoulder.

Q. Mr. Bellamy, will you rise—just stand up and raise your two arms to their fullest extent, demonstrating to the jury your ability to rise, to raise your two arms to their fullest extent?

A. (Witness complied.)

Q. And now, Mr. Bellamy, would you put your arms in front of you and raise your arms to the fullest extent? A. (Witness complied.)

Q. Thank you. You may be seated. Mr. Bellamy, with respect to your neck, do you have any difficulty with that? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Will you describe that?

A. I have a lot of pain in the back of my shoulder and neck, and have a lot of headaches at night in the back of my head and neck, and my neck is kind of stiff.

Q. Are you able to turn the head to the full range of motion?

A. I would say so, by kind of forcing it. It is stiff, and I kind of have to force it.

Q. Now, with respect to your chest, Mr. Bellamy, do you have [36] any difficulty?

A. Yes, sir, I have soreness in my chest and coughing and sneezing. I have a lot of pain in my chest in the low part of the chest.

Q. With respect to your low back, do you have any difficulty?

A. Yes, sir. Not so much as I have had with the lower part of my back.

Q. Will you describe that difficulty?

A. Well, I have had a lot of pain in the lower part of my back, kind of stiffness.

Q. Mr. Bellamy, are you able at the present time to return to your duty as a railroad brakeman?

Mr. Phelps: Objected to as calling for the opinion of the witness.

Mr. Digardi: I think the witness is the best man to know whether he is able to do his work.

The Court: I will allow it.

Q. (By Mr. Digardi): Will you answer the question, Mr. Bellamy? A. No, sir.

(Testimony of William A. Bellamy.)

Q. Now, Mr. Bellamy, with respect to the details of the duty of a railroad brakeman, will you describe in some detail what your duties entail?

A. It consists of switching out cars, setting brakes.

Q. You have to climb up and down boxcars?

A. Climb boxcars, yes, sir, setting brakes, kicking off brakes, [37] and pulling the pins and——

Q. Are you required to get on and off moving cars? A. Yes, sir.

Mr. Digardi (To Clerk): Will you mark those?

Q. Mr. Bellamy, are you in pain at the present time?

A. I have pains at nights with my head and back and shoulders. I don't sleep at night, but a short while at a time, and I wake all through the night with my head and shoulders, mostly my head and neck. [38]

* * *

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 13 for identification. Will you tell us what that photograph shows?

A. I will have to put on my glasses. That shows the highway, this shows the track, and that shows the boxcar.

Q. Is this the shed that is shown and marked "shed" in Plaintiff's Exhibit No. 6?

A. Yes, it is.

Q. And what direction is this, looking down the highway from what direction?

(Testimony of William A. Bellamy.)

Mr. Phelps: Is that in evidence yet?

Mr. Bledsoe: Yes. It is being exhibited to the jury. I might want to make some objection to some of those pictures.

The Court: Well, I think you should just have it identified in a general way by the witness.

Mr. Digardi: I might give him the whole group and ask him if these views of it are the scene of the accident generally.

The Court: Approximately. And then you can go over each one after you put it in evidence.

Q. (By Mr. Digardi): Mr. Bellamy, would you look over these pictures? I think you have already seen them, Mr. Bellamy—those pictures?

A. Yes, sir, I believe I have seen them before.

Q. Were you present when those photographs were taken? [41] A. Yes, sir.

Q. Do they in general show the scene of the accident in question there? A. Yes, sir.

Mr. Digardi: If Your Honor please, we offer in evidence Plaintiff's Exhibits 14 through 23.

The Clerk: 13 through 23, counsel.

The Court: They may be admitted.

(Thereupon Plaintiff's Exhibits for identification No. 13 through 23, being photographs of the scene of the accident, were received in evidence.)

Mr. Phelps: Preliminarily, may I ask Mr. Digardi when those pictures were taken?

(Testimony of William A. Bellamy.)

Q. (By Mr. Digardi): Could you tell us when those pictures were taken?

Mr. Hepperle: I believe I can answer that, Your Honor. They were taken Saturday afternoon by me.

The Court: Now, I would suggest—we are going to take a recess for ten minutes. I suggest you hand those to counsel for the defendants so that they can make objection to any ones that they see fit. Then you may have to lay further foundation for these, or to those that they object to. Is that satisfactory to you gentlemen?

Mr. Bledsoe: Satisfactory, Your Honor.

Mr. Phelps: Yes, Your Honor. [42]

Mr. Digardi: Thank you, Your Honor.

The Court: We will take a brief recess. During the recess bear in mind the admonition the Court has heretofore given you. Ten minutes.

(Recess.)

Mr. Digardi: Mr. Bledsoe, you had some objection?

Mr. Bledsoe: With reference to some of these pictures that have a man in them, we want to object on the ground that they are apparently an attempt to reenact the position of the plaintiff at certain stages in the accident and are self-serving. Then I think one or two of the pictures show a speed limit sign of 35 miles an hour, which I understand wasn't there at the time of the accident.

Mr. Digardi: That is correct. We have agreed

(Testimony of William A. Bellamy.)
that that can be stipulated that the speed limit sign on the side of the road and upon that highway was not there at the time of the accident. It has been placed subsequent to that time.

The Court: All right: I will admit these with the exception of the figure of the man, and then you can lay a foundation by the testimony of this witness or any other witness to show that figure is approximately the correct position——

Mr. Phelps: We join in the objection. I presume, counsel, these are not intended to depict the scene at the time of the accident but just for general purposes?

Mr. Digardi: They are for general purposes of illustrating [43] the scene, not at the time of the accident; they were taken last Saturday.

Q. I show you Plaintiff's Exhibit No. 13 for identification and ask you whether or not that shows Harbor Road looking from the east toward the west. A. Yes, sir.

Q. I am indicating a shed in the right hand corner. What is that shed?

A. The Paraffine plant.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 13 for identification.

If Your Honor please, some of these pictures have a figure in them but the figure has no reference to anything in the accident.

Mr. Bledsoe: I won't object to it with that statement of counsel. Will you indicate that for us?

(Testimony of William A. Bellamy.)

The Court: That is admitted.

(Plaintiff's Exhibit No. 13 for identification was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 14 for identification and ask you generally what that shows.

A. That shows the highway.

Q. Looking from what direction? [44]

A. I think it would be——

Q. Looking from the east toward the west?

A. Yes, sir.

Q. Mr. Bellamy, there is a figure in that picture. This one, Your Honor, we would like to show what the figure indicates.

The Court: You might ask him a question about it.

Q. (By Mr. Digardi): Mr. Bellamy, I show you a picture of a man in the center right hand side of the picture. Does that indicate anything to you?

A. This show about where the switch is.

Q. This man is standing about opposite the switch? A. Yes.

Q. Can you indicate where the switch is?

A. Right there.

Mr. Phelps: Your Honor will understand and appreciate I have difficulty unless counsel shows me the picture that he is going to show as he does it. I have no doubt about what he is showing the witness now. If you do that, I think we can progress faster.

(Testimony of William A. Bellamy.)

Mr. Digardi: There is a man standing opposite the switch.

Mr. Phelps: Will you do that, Mr. Digardi? Then I think we can hurry on.

Mr. Digardi: This picture shows a man standing——

Mr. Bledsoe: Who is that man? Is that Bellamy? [45]

Mr. Digardi: That is Mr. Bellamy. I will mark an X at the location of the switch as pointed out by Mr. Bellamy.

The Witness: Yes.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. 14 for identification.

Mr. Bledsoe: We have no objection.

The Court: Let me see that. You don't mean for identification.

Mr. Digardi: In evidence, Your Honor.

(Plaintiff's Exhibit No. 14 was thereupon received in evidence.)

Mr. Phelps: Is this for the purpose of showing——

Mr. Digardi: Of showing where the switch is.

Q. I show you Plaintiff's Exhibit 15 for identification and show you the figure of a man standing there. Would you point out the switch in relation to that man? A. Here, across the track.

Q. Which direction was this picture taken from?

A. This would be the east facing west.

(Testimony of William A. Bellamy.)

Mr. Digardi: I will mark the location of the switch as indicated by the witness.

We offer that in evidence as Plaintiff's Exhibit No. 15.

Mr. Phelps: I have no objection to 16 going in.

Mr. Bledsoe: I have none. [46]

The Court: Admitted.

(Plaintiff's Exhibits No. 15 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 16 for identification. This picture shows two railroad tracks. Will you indicate which, if any of those, is the main line of railroad?

A. This is the main line, this track here.

Mr. Digardi: I will indicate a figure M indicating main line, and a letter S, indicating the spur track.

The Court: I suggest that you start to pass these that have been admitted to the jury now so that they will get some idea where they are.

Mr. Digardi: They are on the counsel table, Your Honor. They wanted to look at them.

Mr. Bledsoe: No, these have not been admitted in evidence.

The Court: I mean those that have already been admitted in evidence.

Mr. Digardi: These are the ones that are in evidence that the jury hasn't seen. We offer in evidence Plaintiff's Exhibit No. 16.

(Testimony of William A. Bellamy.)

(Plaintiff's Exhibit No. 16 was thereupon received in evidence.)

Mr. Phelps: No objection to 17. Stipulate it goes in.

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 17 [47] showing two lines of railroad. Will you indicate which of those is the main line?

A. This would be the main line.

Q. And which is the spur track?

A. This is the spur track.

Mr. Digardi: I indicate with M main line, and S, spur track.

Q. Mr. Bellamy, on this Plaintiff's Exhibit No. 17 could you indicate on that the location of the point where you dropped off of the train?

A. It would be near there some place (indicating).

Mr. Digardi: I indicate that point marked B-1, indicating the point where Mr. Bellamy dropped off.

We offer in evidence Plaintiff's Exhibit 17.

(Plaintiff's Exhibit No. 17 was thereupon received in evidence.)

Mr. Bledsoe: No objection to that (referring to photograph).

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 18 and ask you which of those is the main line and which is the spur track.

A. That is the main line. That is the spur track.

(Testimony of William A. Bellamy.)

Mr. Digardi: Indicating M for main line and S for spur track.

Q. Does the switch stand show in that picture?

A. Yes, sir (indicating). [48]

Mr. Digardi: I will mark an X at the location of the switch stand.

We offer in evidence Plaintiff's Exhibit 18.

(Plaintiff's Exhibit No. 18 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 19 which shows the picture of a man standing on the highway. Could you tell us what that indicates?

Mr. Bledsoe: We will object to this on the ground that it is a self-serving statement and no proper foundation laid for it.

Mr. Digardi: I don't think the witness has answered the question.

Mr. Phelps: The objection is it is self-serving; it was taken out of court; we were not present, with his own counsel. He can testify what he did without having to bring in self-serving pictures.

The Court: If he can lay the foundation that it depicts approximately where he was standing at the time of the accident, according to him, at the time of the accident, I will permit it.

Q. (By Mr. Digardi): What does that figure indicate, Mr. Bellamy?

A. It indicates a man standing on the highway near the track.

(Testimony of William A. Bellamy.)

Q. Does that indicate anything specially to you, the location of the man? [49]

A. It indicates approximately where the man was struck in the position he is.

Q. Who is the man in the picture?

A. That is myself.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. 19.

Mr. Phelps: Our objection is noted.

Mr. Bledsoe: Same objection.

The Clerk: Is this admitted, Your Honor?

The Court: Yes.

(Plaintiff's Exhibit No. 19 was thereupon received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit No. 20 and ask you what that indicates.

A. That indicates a man just somewhere near the scene of the accident, about approximately where the man was standing.

Q. Which direction is this picture taken from?

A. This would be the west facing east.

Q. (By Mr. Digardi): Plaintiff's Exhibit No. 20 indicates a sign showing the speed limit 35 miles an hour, which was not there at the time of the accident.

The Court: All right. So far as Plaintiff's Exhibit No. 20 is concerned, ladies and gentlemen, disregard the sign "35 miles an hour"; it was not there at the time of the accident.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit No. [50] 20.

(Testimony of William A. Bellamy.)

(Plaintiff's Exhibit No. 20 was thereupon received in evidence.)

Mr. Phelps: We will have an objection to 21, if Your Honor please, on the ground that this picture identified for identification was not taken as of the date of the accident, and this condition was not present at the time of the accident. Unless the purpose is only for general illustration, I think it should not be admitted.

Mr. Digardi: We will withdraw that one anyway.

The Court: Not admitted.

The Clerk: 21 is marked only for identification.

Mr. Digardi: We will not offer 22 and 23 at this time.

The Clerk: 21, 22 and 23 are marked for identification only.

Mr. Digardi: That is correct. [51]

* * *

Cross-Examination

By Mr. Phelps:

Q. Mr. Bellamy, the line that you have referred to, the track, as the main line to the harbor, you don't mean to indicate by that that that is the main line of the Southern Pacific Company that goes down the Peninsula?

A. The main line to the harbor. No, sir, it is not the main line of the Southern Pacific at all.

(Testimony of William A. Bellamy.)

Q. In other words, there are no passenger trains that run on there? A. No, sir.

Q. That is a simply a switching track?

A. Yes.

Q. In other words, what you fellows call the main line, it is nothing more or less than a lead to the industries? A. That is right.

Q. And only freight cars go on that?

A. Yes, sir. [53]

Q. And when you continue on what you call the main line to harbor, you continue on to that Pacific Portland Cement plant which is away out at the end of there and by the Bay where the ships come in, is that right? A. Yes, sir.

Q. And this road that parallels it is the road that serves that? A. Yes.

Q. Serves the Pacific Portland Cement Company? A. Yes.

Q. Did you say that that was a heavily traveled road?

A. Well, a good bit of traffic on the road, yes.

Q. At the time of this accident, that is something you knew, isn't it?

A. Yes, sir, I know.

Q. You knew that it was a heavily traveled road and that you could expect cars in either direction, and trucks, is that right? A. Yes, sir.

Q. Now, then, the spur that you have indicated here as the paraffine spur, that is the track that you were pulling out on at the time of your accident, is that right? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. And you had been in there. When you went in there you went in, you say, with a car ahead of the engine? [54] A. Yes, sir.

Q. You are pretty sure of that? A. Yes.

Q. Are you pretty sure that you had three cars when you came out?

A. Three cars, yes, sir, I am pretty sure of that.

Q. Could there have been two?

A. To the best of my knowledge, there was three cars.

Q. And one of those cars you were pulling out is what you fellows call a baby load, is that right?

A. Yes, sir, that is right.

Q. A baby load, so the jury will know, is a load that was partially loaded but the load had not been completed so the doors weren't closed and there was further loading to be done on that car, is that right? A. Yes, sir.

Q. You were to put that car back right in on that same track?

A. That is my understanding.

Q. Now, then, on this move down, had you been all the way down to the harbor or not before this?

A. No, sir, we hadn't.

Q. So that you had come then immediately from Redwood City? A. Yes, sir.

Q. Done some switching work there?

A. Yes, sir. [55]

Q. Then you had crossed the Bayshore with

(Testimony of William A. Bellamy.)

one car ahead of the engine and two behind it?

A. Yes, sir.

Q. And had then gone into this paraffine spur; that was the first work that you did after you crossed the Bayshore? A. Yes, sir.

Q. After you crossed the Bayshore and went in here, what work did you yourself do with reference to the work that was being done when you made a joint, or whether you did when you went on that spur, before you pulled out of the spur?

A. The joint was practically all the work that was to be done and pull out.

Q. Did you make the joint between the two cars that were in there and the car ahead of the engine?

A. Yes, sir, I was helping making the joint.

Q. You say you helped. Was there somebody else did it with you?

A. The crew was there. The chances are they were there working with me.

Q. Do you remember what you were doing in there before the move out?

A. Making the joint.

Q. Well, by that do you mean that you gave the signals to the engineer or did somebody else, or do you know?

A. As well as I remember, I gave the signals.

Q. That was you joined up?

A. Yes, sir.

Q. After you made that joint, after the cars

(Testimony of William A. Bellamy.)

coupled up,—by the way, were the two cars that were in there coupled up?

A. As well as I remember, the two cars were coupled. I wouldn't be positive about that.

Q. Could they have been spotted for loading at various doors so that they were not coupled up?

A. Yes, sir, they could have been.

Q. So that there were some other joints to be made then before you came out?

A. I wouldn't be positive whether there were other joints or not.

Q. When you came out of there, you say that you were riding on the short ladder, is that right?

A. Yes, sir.

Q. That would be the ladder next to the pilot?

A. Yes, sir.

Mr. Digardi: What is the pilot, counsel? May we have that explained?

Mr. Phelps: Yes.

Q. Will you tell us what the pilot is?

A. That is the front of the engine.

Q. Cowcatcher?

A. Yes, sir, the steps where you step up on one.

Q. That is the cowcatcher part of the engine?

A. Yes, sir.

Q. And it was a backup movement that would place your engine there on which side?

A. That would place the engine there on the right side.

Q. In the direction of the movement or not?

(Testimony of William A. Bellamy.)

A. The direction of the movement would be a backup movement.

Q. So the engineer doesn't reverse positions, of course?

A. No, sir, he doesn't reverse the side of the engine at all.

Q. You will have to understand that we have to get this picture over so everybody can understand. A. Yes, sir.

Q. The engineer stays in the same position, he doesn't reverse his positions when he backs out?

A. No, sir.

Q. He doesn't have controls on both sides of the engine? A. No, sir.

Q. When you come in there, you are ahead of him and when you come out the engineer is still on the same side? A. Still on the same side.

Q. So far as the fireman is concerned, he has nothing to do with the control of the engine so far as the brakes or any throttle or anything of that kind? A. No, sir.

Q. You mean, no, sir, he does not, or no, sir I am wrong? [58]

A. He doesn't have control of the brakes, of the movement of the train.

Q. When you were coming out of there and as you were coming out and were riding along there, do you remember, Mr. Bellamy, where the other members of your crew were?

A. I couldn't say the exact spot where the other

(Testimony of William A. Bellamy.)

members were. Some of them were on the cut and some of them on the ground; I wouldn't say.

Q. What do you mean by on the cut?

A. That is the car that was ahead of the engine.

Q. By the cars ahead of the engine, because you are in a backup movement, do you mean the east side of the engine, the pilot side of the engine?

A. Yes, sir, that would be the cut of cars.

Q. That would be the end in towards the spur?

A. Yes, sir.

Q. And you say some of them were on the cut and some were not, is that right?

A. Yes, sir.

Q. What is your memory of who was on the cut?

A. Well, the best of my memory was Quinlan and Husson; I wouldn't be positive whether they both caught the cut, or whether there was one of them on the ground, but to the best of my recollection, Quinlan caught the cut of cars.

Q. Quinlan was the what? Rear brakeman?

A. He was the rear brakeman.

Q. So then he was on the rear end of that cut as it was going out? A. Yes, sir.

Q. The trailing end in the direction of the backup movement, is that right? A. Yes, sir.

Q. Where was Husson? Was he riding a car in between him and you, or do you know?

A. I believe Husson caught the car there near each other, and just short space in between the cars. As well as I remember, they both——

(Testimony of William A. Bellamy.)

Q. That is your recollection of it?

A. Yes, sir.

Q. That was what you saw?

A. I wouldn't be positive whether they was both on that cut of cars or not.

Q. What position in the crew was Mr. Husson?

A. Mr. Husson?

Q. Yes.

A. He was near the—near the rear man, and as well as I remember, they both caught the car there.

Q. No; you don't understand my question.

A. I guess not.

Q. What position on the crew was he, Mr. Bellamy? [60]

A. He was what we call the tag man. He is the man that carries the switch list.

Q. Is he the swing man or the tag man?

A. Swing man or tag man, that is right.

Q. Once again, so we will get all our terms, the swing man works between the head man and the rear man, is that right?

A. Yes, he is the man with the switch list, that tells which cars go on.

Q. He is checking the cars to see whether you pulled the right cars and where those cars are going? A. Yes.

Q. He assists the conductor in that respect?

A. In that respect.

Q. As you were coming out of there, and after you were in a movement backing up and riding

(Testimony of William A. Bellamy.)

along on this ladder, you detrained. Can you tell us where with reference to the frog?

A. Would you state that question again, please?

Q. You got off the train, Mr. Bellamy; as you were coming out, you stepped down off the train?

A. Yes, sir.

Q. You were riding on the boxcar on the short ladder, but you were facing at the time you got off in the direction of the engineer, weren't you?

A. I had been facing the crew coming out.

Q. Let's go back a step then. As you were coming out on that [61] ladder, you say you were facing the crew, is that right?

A. I had been facing the crew coming out.

Q. Mr. Bellamy, before you got off the boxcar, didn't you turn around so that you were then facing the engineer—and this is while you were still on the ladder?

A. No, sir. Could I kind of explain that?

Q. Well, if you can, I want you to, certainly, but first, can you answer that question one way or the other and then explain all you want?

A. I was facing the crew when I let loose of the ladder, just about the time I was supposed to let loose of the ladder and light on the rgound.

Mr. Bledsoe: May I have that answer read?

(Answer read.)

Q. (By Mr. Phelps): What part of the crew, Mr. Bellamy? Do you mean the men in the direc-

(Testimony of William A. Bellamy.)

tion towards the harbor or do you mean the engine crew in the opposite direction?

A. I was facing the train crew just as I stepped off the car onto the ground I turned towards the road, the highway and facing the engineer.

Q. All right. Now, if you will try to follow me. This is the boxcar here, let us assume.

A. Yes, sir.

Q. Let us assume there is a ladder here and you are holding on. The movement is in this direction so your engineer is [62] behind you; as you were riding along, you were riding along then leaning out, I take it? A. Yes, sir.

Q. You never rode along on a boxcar without leaning out, did you? A. That is right.

Q. When you were leaning out you were looking back in the direction for which the movement had come, is that right? A. That is right.

Q. Back into the spur? A. That is right.

Q. Were you looking in that direction as you dropped off? A. No, sir.

Q. No. That is what I am saying. Didn't you turn around before you dropped off—turn around still on the ladder looking towards the engineer?

A. Yes, sir, I turned that way.

Q. You did turn around then before you dropped off and you were not facing the crew or in the direction from which this car came at the time you dropped off, isn't that true?

A. Yes, sir, that would be true.

(Testimony of William A. Bellamy.)

Q. For how long a distance did the car come out of the spur after you had turned your back to your crew, which was towards the harbor?

A. Could you repeat that again? [63]

Q. Certainly, certainly. Any question you don't understand, you just don't hesitate to speak right up. A. Yes, sir.

Q. I will withdraw it and put it a little simpler. As you were coming out, you have told us now that you turned towards the engineer. How far did the boxcar travel after you turned around with your back towards the crew?

A. How far did the boxcar travel?

Q. How far did the boxcar move?

A. Just as I turned, I let loose of the boxcar and that was——

Q. Did it go any distance at all? Did you turn immediately——

A. Yes, sir, I dropped loose immediately.

Q. It didn't go a matter of even a foot, you think?

A. The boxcar kept moving, yes, sir.

Q. It moved some distance while you adjusted your position from leaning out this way in the direction of the crew until you turned around and got yourself firmly stanced in the direction of the other way, didn't it?

A. It was only a matter of just turning my body and my head, yes, sir.

Q. You had to shift your feet, didn't you, before you got off?

(Testimony of William A. Bellamy.)

A. No, sir, my feet was on the steps.

Q. Didn't you have to shift your feet now, Mr. Bellamy? You have been a railroad man a good many years, you say.

Mr. Hepperle: Objected to as asked and answered and as [64] quibbling.

The Court: I didn't hear the question.

Mr. Phelps: I haven't had a chance to ask it, Your Honor.

Q. Didn't you have, before you got off the train, to change your feet so as to put them firmly on the step so that you dismount this way?

Mr. Hepperle: Objected to as asked and answered, Your Honor. The man has said he didn't have to change the position of his feet.

The Court: I will allow it because it is cross-examination. You can ask a question more than once.

Mr. Digardi: Answer the question, Mr. Bellamy.

A. No, sir, I didn't have to change positions of my feet no more than just a swing on the ball of the foot.

Q. (By Mr. Phelps): Just a swing of the ball of the foot. As the car was moving, about how fast was it going, Mr. Bellamy?

A. Just a very slow rate of speed; it would be hard to estimate.

Q. Can you give us an estimate?

A. Oh, two, three, four miles—from two to—two or three miles an hour.

(Testimony of William A. Bellamy.)

Q. Two or three miles an hour? A. Yes.

Q. A perfectly normal switching movement as far as you were concerned? [65]

A. Yes, sir.

Q. And nothing wrong with the step or the stirrup or the ladder? A. No, sir.

Q. It didn't enter into this accident at all?

A. No, sir.

Q. As you stepped off, you didn't lose any footing or have any footing conditions that were any trouble, did you? A. No, sir.

Q. You didn't trip, stumble or fall?

A. No, sir.

Q. There was no jerk of the engine just as you got off? A. No, sir.

Q. Perfectly smooth movement?

A. Perfectly smooth.

Q. So that so far as you as a brakeman, so far as you getting off of the boxcar, you did it perfectly smoothly and routinely? A. Yes, sir.

Q. It wasn't until after you had gotten off of that and taken some considerable steps off into the highway that you were in this accident, is that right? A. That is right.

Q. When you stepped off and as you stepped off, you say that you looked into the direction of the engineer, is that right? A. Yes, sir. [66]

Q. And you walked, did you, upon the point where you got off in a diagonal direction out into the highway? A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. And where you got off, Mr. Bellamy, you got off, whatever the point may be marked—and I might clear that just a second—whatever the point might be marked on this map by your counsel, you got off, did you not, in such a position so that when you got off you had to cross this track which is marked main line before you came to the highway, isn't that true?

A. One rail; just the one rail.

Q. So that where you stepped you stepped off between the rails of the two tracks, is that right?

A. That is the best of my recollection and memory.

Q. Now, then, one other thing, Mr. Bellamy. When you step off a boxcar, and on this occasion, directing yourself to this occasion, you step out away from the boxcar, don't you?

A. Not necessarily.

Q. You don't drop straight down; that isn't very safe practice, is it?

A. In a slow movement like that——

Q. You don't just simply drop down; you swing yourself away and get free; is that what every brakeman does, a natural reaction?

A. If it is an ordinarily slow moving train like that, you just step down with one foot. [67]

Q. Just step straight down?

A. You wouldn't reach away from it.

Q. You just drop right from your position on the side?

(Testimony of William A. Bellamy.)

A. Just an ordinary step like stepping off.

Q. So you do take a step out, don't you?

A. Yes, sir, you don't step right——

Q. You do step out so that you are not going to follow the cars which are moving?

A. Just an ordinary step down like stepping down off of a——

Q. Don't you, Mr. Bellamy, and didn't you on this occasion, step away from the cars, take one step at least away when you first let go?

A. From the car?

Q. Yes.

A. Yes, sir, I moved away from the car.

Q. So that you would have stepped away from the side of the clearance of the car. Your first step down stepped away from the car about how far? Three or four feet? A. No, sir.

Q. Two or three feet?

A. I have an idea when I stepped from the car it would be, the chances are, two feet.

Q. Two feet away. Was that with your left foot or right foot when you stepped down at that point two feet away from the car?

A. I couldn't be positive which one it was. [68]

Q. Didn't you step down so that with your arm out you were still with your arm extended out beyond for clearance from the side of the car?

A. You have clearance, yes, sir.

Q. So whatever distance it was from the side of the car, it would be the distance of your arm plus

(Testimony of William A. Bellamy.)

another foot or so where you stepped down first, isn't that right?

A. It wouldn't be that far because—on an ordinary step down like that.

Q. Well, do you remember this particular one? Isn't that about what it was?

A. It was only just a short way from the car; I couldn't be positive about that.

Q. When you stepped down, you say you stepped between the rails, just about midway, center between the rails, the center line of the track about, approximately?

A. The best I remember, I just stepped down near the outside rail, the nearest rail on the highway.

Q. How far from the nearest rail?

A. I would say near the rail.

Q. Well, how far is near? I am sorry.

A. Well——

Q. The best you can, please. A foot or two?

A. I would say six inches or a foot, somewhere; just to be safe in missing the rail—a foot. [69]

Q. Then you stepped over that rail?

A. That is the best of my remembrance.

Q. And then ran forward in the direction whence the engine was going and diagonally, is that right?

A. That is right.

Q. Out into the highway? A. Yes.

Q. About how many steps did you take from the

(Testimony of William A. Bellamy.)

time you first stepped down until the time you were hit?

A. It would be pretty hard to say. Ten, fifteen steps.

Q. About ten or fifteen normally running-walking steps? A. Maybe twenty.

Q. Fifteen or twenty steps? A. Yes.

Q. Sort of a running motion, was it, Mr. Bellamy? A. I would call it a running motion.

Q. You would call it running. Then from the time you stepped off of the car until the time you were hit, did you ever turn around to see whether there was anything coming from behind you?

A. Not after I hit the highway, no, sir, I hadn't time to turn around.

Q. I am not asking you that question; I am asking you if you looked, turned around and looked at all at any time not only after you hit the highway, but while you were still in a place of safety in between those two rails on the main line track. Did you turn and look then?

A. Yes, sir, I turned around.

Q. After you detrained, after you got off?

A. Not after I left the train.

Q. You didn't look around in the direction from which this truck was coming at any time after you got off? A. Not after, no, sir, after.

Q. Indeed at any time after you changed your position on the side of the car from looking to-

(Testimony of William A. Bellamy.)

wards the crew to looking towards the engineer, is that right? A. That is right.

Q. Can you tell us about how far into the highway you were at the time you were struck?

A. It would be hard to say; approximately——

Q. Well, have you any way——

The Court: Let him finish his answer.

Mr. Phelps: I am sorry; go ahead.

A. Six or seven feet; from five to seven feet.

Q. And can you say with reference to the center line of the highway?

A. No, sir, I wasn't near the center line.

Q. Well, can you give us any idea how far?

A. In reference to the center line and the track, I would say approximately one-third or so from the distance from the center line to the car. It would be something near a third of the way [71] from the track to the center line.

Q. You mean by that the rail?

A. Yes, sir.

Q. All right. Now, at the point where you dropped down, the first step down and in a very slow, easy movement, only two or three miles an hour, at that point where you got down, you didn't step right onto the highway or any pavement there?

A. As well as I remember, I stepped between the ties. That is the best of my remembrance.

Q. That is the dirt between the ties, isn't it?

A. As well as I remember the step, yes, sir.

(Testimony of William A. Bellamy.)

Q. Do you know what part of the vehicle struck you? A. No, sir, I couldn't say.

Q. Did you ever see it? A. No, sir.

Q. Did you ever hear it? A. No, sir.

Q. Before you were struck, did you hear any noise at all indicating the presence of a vehicle?

A. No, sir.

Q. Did you hear the squeal of brakes?

A. No, sir.

Q. Did you hear anybody shout, anybody at all?

A. No, sir.

Q. Is there anything wrong with your hearing?

A. No, sir.

Q. Is there anything wrong with your eyesight?

A. No, sir.

Q. Do you wear glasses?

A. I wear glasses for reading, but at a distance my eyes are good.

Q. You weren't wearing glasses then?

A. No, sir, I only wear them for reading.

Q. Now, then, as you were hit, do you remember whether you were dragged at all by the vehicle or did you just fall right where you were hit?

A. I couldn't say.

Q. Do you know of your own knowledge?

A. No, sir, I don't.

Q. Did you feel or see any part of the vehicle go beyond you before the impact?

A. No, sir.

Q. You understand what I mean by that? Did

(Testimony of William A. Bellamy.)

you get any glimpse of the vehicle going beyond you before you were hit?

A. No, sir, I didn't get any glimpse of the vehicle.

Q. Did you hear the noise of the vehicle passing you before you were hit? A. No, sir.

Q. And at the time that you were hit, you say you were looking at the engineer? [73]

A. At the time I was hit, yes, sir, I was facing the engineer.

Q. You were looking right at him?

A. Not right at him; I was facing in that direction.

Q. Were you looking at him or not looking at him?

A. I was looking at him; of course I wouldn't say I had my eyes direct on him, but I was looking at him and the engine.

The Court: It has reached 4:00 o'clock.

Mr. Phelps: I am at a convenient place.

The Court: Ladies and gentlemen, we will recess now until 10:00 o'clock tomorrow morning. During the recess bear in mind the admonition that I have heretofore given you.

(Thereupon an adjournment was taken to Wednesday, tomorrow, November 2, 1949, at 10:00 o'clock a.m.) [74]

(During the trial of the above entitled case, following the testimony of Dr. Leonard Barnard, the following occurred:)

Mr. Digardi: Mr. Bellamy, will you resume the stand?

WILLIAM A. BELLAMY

resumed the stand in his own behalf.

Cross-Examination
(Continued)

By Mr. Phelps:

Q. Mr. Bellamy, before we broke off yesterday evening, I was asking you about what you were doing after you got off this cut of cars and you told me that after you got off, you ran in a diagonal direction into the road facing and watching the engineer, is that correct? A. That is correct.

Q. And you were doing that all that time while you were running out there? A. Yes, sir.

Q. All right. Now, then, so far as the engineer is concerned, this is true, is it not, that the engineer doesn't give you any signals?

A. No, the engineer doesn't give me any signals.

Q. The engineer is only there to receive signals, isn't that correct? A. That's right.

Q. Now, then, when you were backing in—if I may turn this map around so we may see it—when you were backed in on this spur and you picked up some cars in there, can you tell us how far [74A] into the spur you went to pick up those cars?

(Testimony of William A. Bellamy.)

A. Went into the shed, the car was spotted at the shed.

Q. Well, now, that shed runs for some little distance in an easterly direction not shown on the map. What end of the shed, do you remember?

A. That would be on the west end.

Q. The west end of the shed. In the part shown in the diagram?

A. In the part shown in the diagram, that's right.

Q. All right. So that the only distance, then, that you went in was the distance of—would you estimate in car lengths two or three car lengths into that spur?

A. From the end of the spur into the shed, the distance of the car lengths? Is that the question?

Q. Well, I will withdraw it. I want you to do that, I want you to understand my questions. We will put it a different way to you, maybe you can understand it. What I am trying to say to you is, when you went into this spur, Mr. Bellamy, to pick up these cars, about how far int the spur did you go? Can you give us that distance, before you picked up your first car?

Mr. Digardi: How far did what part of the cut go? Maybe that would help him.

Q. (By Mr. Phelps): You had a boxcar, did you? A. Yes, sir.

Q. Ahead of you, of your engine? [74B]

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Now, how far did the most easterly end of that boxcar go into that spur before you made your joint with the first car that was already in on that spur?

A. The boxcar was stopped just before we got to the car that was spotted at the shed and stood there for some time.

Q. Now, then, whatever this distance works out, that is how far you went in? A. That's right.

Q. All right. Now, which was the baby load, do you remember that?

A. As well as I remember, the baby load was on the west and the chances are an empty on the east end. That is the way I had it in mind.

Q. I see. Now, Mr. Bellamy, so far as——

Mr. Phelps: I won't be using the map any more, gentlemen, if you want to resume your seat. [74C]

* * *

Q. Now with reference to this accident, you were what they call a pin man, as I understand it, is that right? A. Yes, sir.

Q. And also the head brakeman?

A. Yes, sir. It is the same job.

Q. Was there another head brakeman besides you? A. No, sir.

Q. When you went into that spur you had a box car already on your engine, did you, in front of it? A. Yes.

Q. So when you coupled on whatever box car was in there you would couple at the head end of

(Testimony of William A. Bellamy.)

the box car that was on the engine with the box car standing on the spur, is that right? [78]

A. That is right, yes, sir.

Q. And you think you made that couple?

A. Yes, sir, I think I made that couple.

Q. And did anybody help you with it?

A. Well, there is other men around there; I wouldn't be positive whether they passed any signals or give any signals or not; I wouldn't be positive.

Q. Well, after making the couple, did you give a signal?

A. After making the—no, sir, no more than back out. After we had coupled on then we—there was a back up signal given.

Q. Who gave it?

A. I believe Mr. Husson gave that, as well as I remember.

Q. Where were you at the time the back up signal was given?

A. We was near the engine, near the front of the engine.

Q. You personally? A. Yes, sir.

Q. Were you on the ground or were you on the car when that signal was given?

A. I was on the ground.

Q. Did you catch on to the train as it was moving?

A. Just about the time it started moving, yes, sir.

Q. You swung on the end of the box car that

(Testimony of William A. Bellamy.)

was right next to the front of the engine, did you?

A. Yes, sir.

Q. And you rode in that position not looking at the box car [79] itself but looking toward the shed where you had picked up the baby load?

A. Yes, sir, I was in a position where I could turn my head to look in either direction.

Q. Which way were you looking?

A. I had been—well, I had faced each way; I had been looking in each direction coming out.

Q. Now as the train started to back away from the shed where was Mr. Husson?

A. Mr. Husson was there near me, near the front of the engine.

Q. Was he on the ground?

A. Yes, sir, he was on the ground at that time.

Q. Did you see him swing on to the train?

A. I wouldn't be positive whether he caught the train or not.

Q. As a matter of fact, he didn't get on the train at all, did he?

A. I wouldn't say about that, because he wasn't on the train—he didn't catch the train there with me. He might have caught the rear car, but I wouldn't be positive whether he caught the train at all or not.

Q. In your position on the train there were at least box car lengths between you and the end of the train to the east, is that right?

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. You picked up two box cars; that made three cars? [80] A. Yes, sir.

Q. You had the length of three box cars between you and the back end of the train? A. Yes.

Q. Where was Mr. Quinlan?

A. Mr. Quinlan was near the rear car; I wouldn't be positive whether he was on the rear car or the second car, but it was the cut there, as well as I remember.

Q. Was he on the ground or was he on the car?

A. I think he caught the car just after we started backing.

Q. What part of the car was he on when the train started backing from the shed? Was he on the top of the car, or on the side or the end of it, or where?

A. He caught the car. That is about as much as I remember.

Q. And you don't know whether he caught the last one or the next to the last one, is that it?

A. As well as I understand, it was where the second and the last car goes together, one of the steps there. There was only a short distance between the two.

Q. As you understand it. I don't want what you understood. I want what you saw. Did you see that?

A. As well as I remember, yes, sir, as well as I remember.

Q. So that he was in your view, was he?

(Testimony of William A. Bellamy.)

A. He had been in my view, yes, sir.

Q. Well, he was in your view as he was backing out then, isn't [81] that right?

A. Well, yes, sir, I can see Mr. Quinlan.

Q. Or you couldn't see Mr. Husson after the train started backing out, could you?

A. I don't remember seeing Mr. Husson; I wouldn't be positive whether I could see him or not.

Q. And in your position as you were riding the side of the box car, you could see the engineer, could you not?

A. Yes, sir, I could see the engineer.

Q. And you knew, did you not, that the conductor on the train had gone across the highway over here out of the south side of the highway?

A. I didn't know just where the conductor was.

Q. Did you see him when your train started out?

A. Yes, sir, the conductor was over there with the crew when we started out.

Q. What do you mean by "over there"? Do you mean he was down by the shed?

A. We was all standing out there in front of the engine like, along the side of the car.

Q. Down here on the spur?

A. Yes, sir, on the spur.

Q. And your engine was three box cars back here then, is that right, back to the west?

A. The engine was near the shed. The second—there would be [82] the engine and one car west of the shed when we started away.

(Testimony of William A. Bellamy.)

Q. Yes, but between you and the shed there were two box cars you had picked up and one car that was on it, isn't that true?

A. Yes, sir, we picked up the two cars but the car that we had a hold of hadn't gone all the way into the shed.

Q. That is what I understand. So that you were at least one box car to the west of the west edge of that shed before you started to back out?

A. Yes, sir.

Q. A box car is about how long?

A. Approximately 40 feet, I have an idea.

Q. About 40 feet? A. I would say 40 feet.

Q. Isn't it 50 feet?

A. We have different lengths.

Mr. Phelps: They are between 40 and 50 feet. I think they average about 45 feet.

Q. (By Mr. Bledsoe): How much of the box car was into the shed?

A. The box car we had a hold of?

Q. Yes.

A. Just a very short—just the end of it.

Q. How many feet of it, would you say?

A. I wouldn't say over four—two to four feet, if any.

Q. Two to four feet? [83] A. If any.

Q. At that time were there any cars of any description on the main line that were east of the spur or frog or whatever it is they call it, down here where you switch off of the main line? Were

(Testimony of William A. Bellamy.)

there any box cars or any other cars of any type east on the main line?

A. I never noticed any others.

Q. Do you know whether there were or not?

A. I don't think so.

Q. What was in this baby load or the half-filled car?

A. It was more or less of ceiling for building, it looked to me like as——

Q. Asbestos?

A. Well, what you would call——

Mr. Digardi: Composition shingles.

A. The ceiling for a building.

Q. (By Mr. Bledsoe): What shape was it?

A. I never particularly noticed the shape of it.

Q. Like this on this ceiling?

A. Something similar to that, yes, as far as I—I didn't go in the car. I just saw it from the door there; I could see something of that kind in there.

Q. How was it stacked in there?

A. It looked to be just laid down.

Q. Laid flat. Nothing breakable in it? [84]

A. Nothing breakable, I wouldn't think, no, sir.

Q. Now as you were moving backward here towards the west and riding on the train, do I understand there was no one west of the engine?

A. I don't think so, no, sir.

Q. And there was west of the engine attached to it a caboose? A. Yes, sir.

Q. Anything else? A. A car—box car.

(Testimony of William A. Bellamy.)

Q. A box car and a caboose?

A. As well as I remember.

Q. Now you say that as you were backing up and going in a westerly direction that you were hanging on the side of the box car so that you could turn your head and look in either direction, either to the front or the back of the train, is that right?

A. Yes, sir.

Q. At that time you could see Mr. Quinlan and you could also see the engineer, is that right?

A. Yes, sir.

Q. Did you at any time after your movement started to back up on this spur until the time you got off, see any signal given by any other man in the crew?

A. No, sir, not after we started moving.

Q. The only signal that had been given up to that time, up to [85] the time you got off the train, had been the signal given by Husson to back up? A. Yes, sir.

Q. That is right. And that was given before you even hooked on to the train?

A. Before I caught the train, yes, sir.

Q. Now you swung off the train while it was moving, did you not? A. Yes, sir.

Q. And as I understand, your idea is that you got off at this point B-1 that is shown in the diagram, Plaintiff's 6, which would put you between the rails of the mainline track, is that right?

A. I believe that is right, yes, sir.

(Testimony of William A. Bellamy.)

Q. And from that point you broke into a run and ran in a southwesterly direction diagonally out into the highway, isn't that right?

A. Yes, sir.

Q. Were you running at the time the accident happened?

A. I believe I was in a moving position, yes, sir; I was headed for the switch, near the switch there and was just about the stopping point, but I believe I was still in a moving position.

Q. Where were you at the time you were hit, with reference to the engine? Were you opposite any part of the engine?

A. I have an idea I was just ahead of the engine a ways.

Q. By ahead of it, do you mean that you had overtaken the [86] engine and were a lap ahead of it, or were alongside?

A. I was moving approximately the same distance the train was moving, so I wasn't very far from the engine, to what I had been riding on that box car.

Q. About the same place, the front of the engine?

A. Somewhere near there, I have an idea.

Q. And you ran, you think, about 20 steps?

A. 15, 20 steps; it would be hard to judge how many steps I did take.

Q. And your stride is about three feet a stride, is it, running or walking?

A. Hardly that far, I guess. In the neighborhood of three feet, yes, sir. Hardly so far.

(Testimony of William A. Bellamy.)

Q. Now as an army man, you know that a marching step is at about four miles an hour?

A. I don't know exact.

Q. Is that about right?

A. Yes, sir, I have an idea that would be somewhere near right.

Q. And you were going faster than that, weren't you? A. Not very much faster than that.

Q. But it was a run?

A. It was a running movement; it wasn't a natural walk.

Q. Now during the time that you were running, were you looking right at the engineer?

A. I wouldn't say I was looking direct at him. I had my face [87] in that direction.

Q. And the next thing that you were going to do was to line the switch, isn't that right?

A. Yes, sir.

Q. And that was to be done when the three box cars that were being pulled backward by the engine had cleared the switch points? A. Yes.

Q. Is that right? A. Yes, sir.

Q. After you lined the switch were you to stand there at the switch where you were making the change of the switch?

A. My duty was to line the switch after the crossover and then bring him back again. It would be a come ahead signal, to put the cars on the main line. That was my duty there.

Q. You were going to stand there at the switch to do that?

(Testimony of William A. Bellamy.)

A. No, sir, I would have crossed over the switch, opposite the switch to do that.

Q. Well, isn't it true that the train was going to move east on the main line after you got backed out clear of the switch?

A. Yes, sir, it was going to move east on the main line.

Q. And it was going to move how far?

A. I would imagine 150 feet to get in the clear; just far enough to clear the spur track, to set those cars out.

Q. Then you were going to uncouple, were you?

A. Yes, sir.

Q. Was it the middle car that you were going to put back on the spur?

A. I haven't noticed the switch lift. I didn't know for sure which car went back in, further than the car ahead of the engine went back in, the only one I know.

Q. Have you ever in working as a switchman given a signal to the fireman?

A. I have, yes, sir.

Q. And the fireman relays the signal to the engineer, isn't that right?

A. He tells him what it is. I don't know if he relays it with his hand, but anyway he tells it.

Q. Either he turns and speaks to him across the cab—— A. Speaks to him, yes, sir.

Q. ——or else he—— A. Yes, sir.

Q. At the time the train was backing out the bell was ringing, was it?

(Testimony of William A. Bellamy.)

A. I wouldn't be positive whether the bell was ringing or not.

Q. When you dropped off the train you were east of the switch that you were going to work on, were you not, the actual switch mechanism that you were going to turn over here?

A. Yes, sir, I was east of the switch.

Q. And according to the diagram, that was about the length of [89] a box car or a little more?

A. Yes, sir, I would——

Q. 60 feet?

A. Approximately the length of a box car.

Q. Now, was it your intention to stop when you got off at the switch and wait for the train to go by and then cross over and change the switch?

A. Yes, sir, that was——

Q. And over here across from the switch is an open space there of a shoulder of the road, is there, on the south side of the highway?

A. Yes, sir, there is an open space on that side of the highway that would be across from the tracks.

Q. Yes. A. Yes, sir.

Q. Something was said about rules of the railroad, what you are required to do as a brakeman. Were you aware of all those rules at the time you were working and the time this accident happened?

A. Yes, sir, I remember the rules very well.

Q. Now, if you don't know where a fellow member of your crew is or where the conductor is,

(Testimony of William A. Bellamy.)

you are not supposed to give any signals for the train to move one way or the other, are you?

A. No, sir, you want to make sure there is nobody underneath the train or around it. Of course, you don't have to see every member of the crew.

Q. And the conductor is usually the one in charge of what is to be done about the movement, is he?

A. Yes, sir, he is charge of the movement of the train.

Q. And you said something yesterday about a switchman who works between the head man and something else. What is that? I didn't quite get what you said.

A. The swing man, he is the man that carries a list of the cars, so he knows the number of cars comes out, the number that goes back in.

Q. What is his position in working on the train when the train is moving in the switching movement, such as this? Is he working between the head man and the engineer?

A. No, sir, he is not working between the head man and the engineer.

Q. Who does he work between?

A. Well, as a rule, he works back of the head man and, well, he has no particular place to work in a movement of that kind.

Q. Who was the swing man on your crew? [91]

A. Mr. Husson.

(Testimony of William A. Bellamy.)

Q. You described yesterday the fact that as you were hanging on the box car and you were facing the crew, that would be Quinlan, I assume, the man you refer to as the crew man?

A. Yes, sir, all three of them were behind me.

Q. And then as you swung off, you switched the direction you were facing so that when you got off the train you turned around and were facing toward Redwood City in the opposite direction that you had been facing, is that right?

A. Yes, sir.

Q. Did you face in the direction of Redwood City, some little time, while the train moved along there? A. No, sir, not very long.

Q. Did you do it long enough to determine where your footing was going to be when you dropped off the boxcar?

A. Well, so far as my footing, I had no special place. It is kind of an automatic move there.

Q. You made it all rather rapidly, did you?

A. Yes, sir, it is more or less of an automatic move. You make it every day and it is hard to say just——

Q. Would you mind coming to the map, Mr. Bellamy, and taking a red crayon?

The Clerk: Here is one, Mr. Bledsoe.

Mr. Bledsoe: Thank you.

Q. And just mark from B-1 and this X here, the course that you [92] took after you stepped into, or between the rails.

(Testimony of William A. Bellamy.)

A. You want me to mark it on this?

Q. Yes. Just draw a line showing the course that you took.

A. This would be the actual highway, this is the way I understand it.

Q. That's right. If you don't understand, let me explain this to you. This is the edge of the pavement, the pavement is 22 feet wide. Then there is a slight shoulder between the pavement and the ties, I guess, that stick out there. And this black line here is the southerly rail of the main line. So that you would cross that black line, which would be the rail, and get over the end of the ties, and then there is a space there before you get on the pavement. And draw it so that it will show the angle at which you went.

A. In coming out of here, I stepped off just approximately somewhere in here. I moved over in this direction this way; my intention was to get to this switch, near the switch, to line the switch after it had crossed over, and bring the car back in this direction. So I gets off here and my position had been at the switch when the train had been stopped to line the switch, and that is about the direction (marking).

Q. All right. And then the end of your placing of that line is where the accident happened?

A. Somewhere near there, yes, sir. I wouldn't——

Q. All right. Well, let that be B-2, as the line

(Testimony of William A. Bellamy.)

that is [93] drawn. Is that clear enough for everyone to see? It is very faint. I had better—That will be B-2, the course that you took. You can sit down again now, Mr. Bellamy.

Now, the area to the west of where you got off the train between that spot and this switch, has the ties in between the rails, does it not, as shown by these pictures? A. Yes, sir.

Q. Plaintiff's No. 17 I think shows it. Is that the way it looked on the day of the accident? Is it a fair representation of it?

A. Yes, sir, that is a fair representation of the track; so far as this truck in here, I don't remember.

Q. Well, without reference to any other movable objects, as far as the terrain was concerned, it looks about the way it did at the time of the accident, does it?

A. Well, so far as the track and highway, yes, sir.

Q. Yes. With reference to the track.

Mr. Bledsoe: I will just pass it along so the jurors may look at it again (handing to nearest juror).

Q. Plaintiff's Exhibit No. 23 shows you standing on the main line rail there, does it not, right opposite the switch?

A. Yes, sir, that shows me standing opposite the switch.

Q. And that switch then is right behind you

(Testimony of William A. Bellamy.)

as you are standing in that picture, and that is the one that you were going to move, is that right?

A. Yes, sir, that is the switch I was supposed to move.

Q. And you are facing right across the highway and this area on the other side of the highway, does that fairly represent the condition that was there at the time of the accident, on the stop side of the highway, which would be in this diagram, this area in here, straight across from the switch?

A. So far as this picture here, I don't see the spur—doesn't show the spur in here very good.

Q. Well, without reference to the spur. All I am asking you about is the condition of the terrain across the highway opposite where you are standing. You are facing right across on the other side. You are standing here, are you not?

A. Yes, sir.

Q. In that picture, looking in this direction. Now does the picture fairly show the condition of the terrain over there as it was at the time of the accident?

A. As far as I recall, that is—there is that building over there, this is the highway and kind of a space in there (indicating).

Q. Yes, off the pavement? A. Yes, sir.

Q. There is a shoulder there. I think this Plaintiff's Exhibit 20 shows the shoulder better, does it not?

A. Yes, sir, that shows it better.

(Testimony of William A. Bellamy.)

Q. That is about the way it was at the time of the accident? [95]

A. Well, I wouldn't remember just what it was over in here, but I know it is a space over there between this house and—there is kind of a space. So far as——

Q. Over here, this is what I am talking about. In there.

A. In there, yes, sir. I don't know just what is there, but it is a space. I know it is a space between this and the house over there.

Q. Yes.

Mr. Bledsoe: I will pass this to the jury also.

Q. Plaintiff's Exhibit 7, which is the diagram drawn by the Southern Pacific—am I pointing correctly to the place where the switch is?

A. That is the shed to the right there, isn't it?

Q. The shed here, yes, sir.

A. Yes, that would be the switch there.

Q. I will mark that. I will put an S there showing the switch.

This curve of the road west of the switch is the sharper curve, is it not? It sharpens up after it goes west?

A. It kind of straightens out after it goes.

Q. This Plaintiff's Exhibit 15; does that show it correctly, about how it curves?

A. Yes, sir, that shows about the curve of the road.

Q. Now, at the time this accident happened, of

(Testimony of William A. Bellamy.)

course, you had a train sitting on there in that area where the red X is located, did you not? [96]

A. At the time of the accident, we had some cars right in there.

Q. Covering over that area where the red X is in the photograph?

A. Our train was about the middle of this switch here. We had some cars on each side of it.

Q. So that the train was cutting off the view in that picture if you were standing where the cameraman was with the train on there—the camera wouldn't be able to see around to the west of where that individual was standing in the roadway, would he? A. Not very far.

Mr. Bledsoe: I think that is all. Thank you. I had better pass this to the jury so they will know what we were talking about.

That is all, Your Honor.

Mr. Hepperle: May we have just a moment, Your Honor?

The Court: We will take a recess as soon as the jury has finished looking at these photographs.

(Photographs examined by jury.)

The Court: We will recess now, ladies and gentlemen, until 2:00 o'clock this afternoon. Please bear in mind the admonition I have heretofore given you.

(Thereupon an adjournment was taken to 2:00 o'clock p.m.) [97]

(Testimony of William A. Bellamy.)

Afternoon Session
Wednesday, November 2, 1949, 2:00 o'Clock

Mr. Digardi: Mr. Bellamy, you may take the stand again.

(Whereupon the plaintiff resumed the stand.)

Redirect Examination

By Mr. Digardi:

Q. Mr. Bellamy, was this accident, did it take place at 5:35 a.m. or p.m.? A. 5:35 p.m.

Q. Was it daylight or dark?

A. It was daylight.

Q. What was the condition of visibility?

A. I would say good.

Q. Well, Mr. Bellamy, did you observe the condition of the footing on the other side or on the north side of the track?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial in this case. The question is, what was the footing here where he got off. It certainly hasn't anything to do with this case.

Mr. Digardi: It has this to do, Your Honor.

The Court: Would you read that last question and answer, or the question for me?

(Previous question read.)

The Court: I think I will allow it.

Q. (By Mr. Digardi): Will you answer the question? A. Yes, sir. [98]

Q. What was the condition of that footing?

A. Irregular ground—rubbish and different

(Testimony of William A. Bellamy.)

kinds of things over there. Holes and rubbish, irregular ground.

Q. Mr. Bellamy, you were asked, or you stated on your examination, that you had got off to pass signals from the engineer, or rather, to the engineer from other men. What particular signals would have been required to be passed?

Mr. Phelps: Objected to as leading and suggestive. I don't believe that that is the testimony, and I object to that portion of the question which includes the statement of what he has previously testified to.

Mr. Bledsoe: We join in that objection.

The Court: Well, I think that is more or less correct. I will allow you to ask him the question whether or not he was required to do anything else besides wait for the train to pass and then cross over and throw the switch.

Q. (By Mr. Digardi): Mr. Bellamy, were you required to do anything else other than drop off, wait for the train to pass and cross over and line the switch?

A. I was required to look out for signals in case some should be passed from the rear end.

Q. Whose duty was it to pass signals to the engineer to stop the train after it had cleared the switch? A. It was my duty.

Mr. Phelps: I will object to that as incompetent, irrelevant [99] and immaterial as to whose duty it was afterwards, if Your Honor please.

(Testimony of William A. Bellamy.)

The Court: Well, that has already been answered. He said it was "my duty."

Mr. Phelps: May my objection be noted before the answer?

The Court: Proceed.

Q. (By Mr. Digardi): Mr. Phelps asked you if you heard at any time the automobile as it went by you, or rather, the pickup truck as it went by you. Now, Mr. Bellamy, calling your attention to the movement of cars and locomotive on this track, does that make a noise or otherwise?

A. Yes, sir, it makes a noise.

Q. Is that noise considerable or otherwise?

A. I would say considerable.

Q. Mr. Bellamy, as you were riding on the side ladder of the car pulling out of the spur, did Mr. Quinlan remain in your view at all times?

A. Mr. Quinlan had just passed out of my view.

Q. Had just passed out of your view at what point? A. Just before I left the car.

Mr. Digardi: Mr. Clerk, will you mark these pictures Plaintiff's exhibits next in order? I might state that both counsel have seen these pictures.

Mr. Phelps: Once again, so that we may know which ones you were referring to before you show it to the witness, may we [100] see it? Otherwise it is unintelligible to us, what you are questioning him about.

Mr. Digardi: These are Exhibits 31 through——

The Clerk: 37 for identification.

(Testimony of William A. Bellamy.)

(Thereupon photographs referred to were marked Plaintiff's Exhibits No. 31 to 37, inclusive, for identification.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 32 for identification, and will you tell us briefly what that shows?

A. This shows a locomotive with a boxcar ahead of it.

Q. Could you indicate on that picture where, if any place, you were located on the boxcar as you were riding out of the spur? A. Yes, sir.

Mr. Phelps: Mr. Digardi, which one was that? Was that the one I told you I would have some objection to?

Mr. Digardi: No, I set that one aside.

Q. Would you so indicate?

A. I was riding at that point there (indicating).

Mr. Digardi: I will put an X on the ladder where the witness states he was riding. We offer in evidence Plaintiff's Exhibit 32.

Mr. Phelps: No objection.

The Court: 32 in evidence.

(Thereupon Plaintiff's Exhibit No. 32 was received in evidence.)

Q. (By Mr. Digardi): I now show you Plaintiff's 33 and ask you [101] what that shows.

A. This shows——

The Court: Better start passing those to the jury so they will have in mind the testimony given.

(Testimony of William A. Bellamy.)

A. This shows a locomotive with three boxcars ahead of it.

(Photographs handed to nearest juror by counsel.)

Q. (By Mr. Digardi): Could you indicate on that diagram where you were riding?

A. I was riding at this point.

Mr. Digardi: I will mark an X where the witness states he was riding. We offer in evidence Plaintiff's Exhibit No. 33.

(Whereupon Plaintiff's Exhibit No. 33 was received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 34 and will you state what that shows.

A. This shows just an ordinary boxcar.

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 34.

(Thereupon Plaintiff's Exhibit No. 34 for identification was received in evidence.)

(Conversation between Messrs. Digardi and Phelps out of hearing of Reporter.)

Mr. Phelps: Those are the ones you just referred to?

Mr. Digardi: No, these are the next.

Mr. Bledsoe: You are going to offer these?

Mr. Digardi: I am going to offer these three also, just to illustrate a locomotive and a tender.

Mr. Bledsoe: All right, I have no objection.

(Testimony of William A. Bellamy.)

Mr. Phelps: Well, I have no objection, and I might state, so the jury will know, and for your assistance, Mr. Digardi, that those pictures, by the way, are through my courtesy. I took them, or had them taken. But the point is, I wanted to tell you, so you could bring it out if you wish, that that is the exact engine involved in the accident. And the boxcars, so far as I know, are all standard and it is probably very substantially similar. So if that will help you——

Mr. Digardi: Thank you, Mr. Phelps. We will offer in evidence Plaintiff's Exhibit 35 and 36, which, as counsel indicated, show the exact engine that was involved in this accident.

Mr. Phelps: I might state, though, not taken immediately after the accident, but taken last week. I don't know of my own knowledge of any changes, but I think probably it is the same.

(Thereupon Plaintiff's Exhibits No. 35 and 36 were received in evidence.)

Q. (By Mr. Digardi): I show you Plaintiff's Exhibit 37 for identification and ask you what that shows.

A. This shows a string of cars; that looks like a locomotive there, as well as I can see.

Q. Can you see on that the main line of track?

A. Yes, sir.

Q. And on what track are the boxcars located?

A. The box cars would be on the spur track.

(Testimony of William A. Bellamy.)

Mr. Digardi: We offer in evidence Plaintiff's Exhibit 37.

(Thereupon Plaintiff's Exhibit No. 37 for identification was received in evidence.)

Mr. Digardi: And Mr. Phelps has an objection to 31; if he would state his objection now?

Mr. Phelps: Certainly. If Your Honor please, the picture that counsel now is showing me is marked 31 for identification for the plaintiff. My objection is that I presume counsel intends to prove from this witness the view at that point. The camera obviously was placed from a point, as I think I can very easily establish, and you probably stipulate, where Mr. Bellamy on his story never reached. It shows the engineer's view, if Your Honor please.

Mr. Digardi: Well, we will withdraw this and put that in through the engineer, then.

The Court: All right.

Mr. Phelps: Very well.

Mr. Digardi: Any objection to these, Mr. Phelps?

Mr. Phelps: No.

Mr. Digardi: Mr. Clerk, will you mark this Plaintiff's Exhibit next in order? This is a photograph of a boxcar, an end view, merely to show the overhang of a boxcar over the edge of the rails. It is merely for illustration. This particular car has nothing to do with the accident. [104]

The Clerk: Plaintiff's Exhibit 38 in evidence.

(Testimony of William A. Bellamy.)

Mr. Digardi: We offer Plaintiff's Exhibit 38 for identification in evidence.

(Thereupon photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 38.)

Mr. Phelps: While you are on the same subject, I have got the exact measurements of the standard boxcar, if you want them.

Mr. Digardi: The picture will serve the purpose, unless you want to put that in.

Mr. Phelps: I thought we could stipulate to the exact measurements. You asked your witness earlier and I, over the noon hour, have secured the measurements of the standard boxcar, if you want them. You could have them right now while you are talking about the overhang.

Mr. Digardi: Well, we would have to check that ourselves, and if you could submit it to me, we could put that in at some other time.

Mr. Phelps: All right. [105]

* * *

Recross-Examination

By Mr. Phelps:

Q. Now, Mr. Bellamy, Mr. Bledsoe asked you whether you knew where your conductor was at the time you dropped off this car, and I believe you said that you weren't sure, is that right?

A. Yes, sir, I wasn't sure.

Q. Now, as a matter of fact, don't you know, thinking back,—and wouldn't this refresh your recollection—that your conductor was stationed across

(Testimony of William A. Bellamy.)

the highway on the south side [107] of the highway, across the highway? Don't you know that?

A. I did not see him.

Q. Didn't you see him out there?

A. I did not see him there.

Q. Well, now, Mr. Bellamy, isn't it your duty to know where the other members of your crew are? A. Not away from the train.

Q. Not away from the train? Didn't you see him go over there? A. No, sir, I did not.

Q. You didn't see him go over there. So, as a matter of fact, when you were looking in this direction, then, you weren't in a position to pass any signals, then, even to the conductor, is that right?

A. The conductor wasn't on the train. I was taking signals from the men that were working on the train.

Q. That is what I am getting at. The conductor wasn't on the train.

A. I didn't see the conductor.

Q. All right. So you knew he wasn't on the train? A. If I did, it was after.

Q. And you knew he wasn't riding the point? In other words, you knew there were no members of your crew, as you have already testified before, on the other side or the west side of the engine?

A. No, sir. [108]

Q. All right. So you knew that your conductor was somewhere on the ground, and your testimony is, being a railroad man, that you didn't look

(Testimony of William A. Bellamy.)

around to see where the other man was, is that right?

A. I was watching the men on the train. I wasn't watching the men away from the train.

Q. You weren't—the fact is that you couldn't account for the conductor who had been right there—it didn't interest you at all?

A. Oh, I saw the conductor before he started away, but the exact point I couldn't say where he was.

Q. And did you see him cross the road and go over to that position or not?

A. I didn't see him cross the road.

Q. All right. Now, then, you say that, on redirect from your counsel, Mr. Quinlan passed out of your view. Now, who is Mr. Quinlan? We haven't heard him identified yet.

A. He is a brakeman.

Q. Was he your rear man?

A. He was the rear man.

Q. All right. When he passed out of your view, of course you were looking at him, weren't you?

A. Yes, sir, I had been looking at him.

Q. Now, when he passed out of view and when you were looking at him, can you tell us where he was? [109]

A. He was on the rear car, as well as I remember, where the second and third cars come together. That is as well as I remember.

Q. And do you know whether he was high or low?

(Testimony of William A. Bellamy.)

A. I couldn't say at the exact time.

Q. Well, Mr. Bellamy, you just give us your best memory, because you were there and you made an observation. Now, you would have known whether a man was riding low on a low ladder or whether he was riding high on a high ladder, wouldn't you?

A. The last view I had of Mr. Quinlan, he was on the ladder.

Q. How high up?

A. That would be hard for me to say.

Q. Well, about how high? About halfway up?

A. As well as I remember, he was about the second step.

Q. About the second step?

A. I wouldn't be positive, but it was around there.

Q. All right. Now, Mr. Bellamy, if he was the second step up, then he had to be on the rear end of that rear car, didn't he? Because on the front end of that rear end you have what you railroad men know as the "short ladder," don't you?

A. There are two ladders here together.

Q. That's right.

A. There is where—one of those ladders. I wouldn't be positive which.

Q. Well, was he on the high ladder or the short ladder of the [110] rear car?

A. I couldn't be positive.

Q. All right. But it is a fact, is it not, that every railroad car that you have ever seen, standard

(Testimony of William A. Bellamy.)

construction, has the high ladder on the rear end in the direction of that movement?

A. In the direction of that movement, it would be the rear end.

Q. Now, as the train and engine were coming out and just before you dropped off, the movement was perfectly easy, wasn't it? A. Yes, sir.

Q. It was going perfectly smoothly and slowly?

A. Yes, sir.

Q. It was perfectly easy, to use a railroad phrase, isn't that right? A. Yes, sir.

Mr. Digardi: If your Honor please, we have already gone into this and we have no claim that the man was injured by the movement of the cars or in getting off the train.

Mr. Phelps: That is not the purpose of my question. That was preliminary to the next one, if your Honor please.

The Court: I think it has been repeated a number of times.

Mr. Phelps: If I may be permitted, I show you I have a purpose. [111]

The Court: All right, proceed.

Mr. Phelps: May I have that question and answer read?

(Previous question and answer read.)

Q. (By Mr. Phelps): All right. So at the time you got off that cut of cars, then, there was no occasion for you to give any easy sign, was there?

A. No, sir, no occasion for me giving the easy sign at that time.

(Testimony of William A. Bellamy.)

Q. No, sir. And the sign in railroad signals, with your arms out like this (indicating), is an easy sign, isn't it?

A. Yes, sir, that is an easy sign.

Mr. Phelps: Indicating for the record my hands parallel and outstretched. That is all.

Recross Examination

By Mr. Bledsoe:

Q. Mr. Bellamy, you stated that you were required to look out for signals from the rear and pass them to the engineer; is that what you stated?

A. Yes, sir.

Q. And by the "rear" you mean down toward the shed, is that it? A. That is it.

Q. Down in that direction (indicating)?

A. Yes, sir.

Q. And I understood you to say this morning that up to the time you stepped off the train, you had received no signals from the rear? [112]

A. No, sir, I had received no signals from the rear.

Q. And you say that Mr. Quinlan passed out of your view just before you left the car. He passed out of your view because you quit looking at him, didn't he, when you turned around?

A. Going around the curve.

Q. Well, wasn't it because you turned around that you didn't see him any more?

A. That is deep curve as we was going around

(Testimony of William A. Bellamy.)

the curve, and he was kind of going out of my view on account of the boxcars there.

Q. Now, that was when you were still in the boxcar?

A. Yes, sir; that is the reason I left the boxcar.

Q. All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you?

A. I looked in that direction when I left the car.

Q. After you hit the ground, from that time on you were looking toward the engineer, were you not?

A. I was looking toward the engineer.

Q. That's right. And after you hit the ground, you didn't turn around and look to see whether Quinlan was in your view from B-1, did you?

A. No, sir, I was trying to get in view of Mr. Quinlan. That's the reason I left the car to get on the ground.

Mr. Bledsoe: We move to strike what he was trying to do, [113] on the ground it is not responsive to the question.

The Court: I will let that go out. He has already stated it in response to another question.

Q. (By Mr. Bledsoe): Now, I understood you to say that you were not looking for the conductor but were looking for the man at the rear, is that right?

A. Yes, sir, I was looking for the man on the cars.

(Testimony of William A. Bellamy.)

Q. And you were not extending your gaze away from the train, then; you were keeping it on the trainman, is that right?

A. I was keeping it on the trainman and on the highway.

Q. Well, if you were keeping it on the highway, how far on the highway did you keep it?

A. Well, I could keep it just as far as I could see, because after you head in that direction you can easily see a man on the car and the highway, just as far back as you can see, as the curve will permit.

Q. Well, was there anything south of the spur track that would prevent you from seeing all the way across the highway and even down to the south here, a considerable distance south of the highway?

A. The curve and the boxcars would prevent me from seeing very far back.

Q. You mean these boxcars on the spur track?

A. Yes, sir, you can't see very far. There is boxcars on that curve. [114]

Q. You mean they would prevent you from looking across over here in this direction I am pointing —that would take your gaze south?

A. Not across the highway.

Q. That wouldn't be preventing you, would it?

A. Well, for some distance back there, but after you got a distance back there, you can't see anything at all.

Q. Well, let's just confine ourselves to the area

(Testimony of William A. Bellamy.)

across from the shed. Take this area down here that I am marking off south of the highway, south from the shed and then westerly. There was nothing in that territory that prevented your view from going at least as far as the shed and across the highway south, to the south side of it, was there?

A. I couldn't see the shed from where I was.

Q. I am not talking about the shed, Mr. Bellamy, I am talking about——

A. I couldn't see that far back either. About there (indicating) was as far back as I could see.

Q. Could you see the main line track as far as the shed? A. No, sir, I couldn't.

Q. You could not? A. No, sir.

Q. From B-1 you could not see the main line track as far as there? A. No, sir. [115]

Q. Could you see the highway as far as the shed at the point you got off?

A. I don't believe I could. Not all the way. No, I couldn't. Chances are I seen the edge of it, the outer edge, but I couldn't see the inside curve of it.

Q. You could see the south edge of it, and opposite the shed. I am pointing to the south edge. The point where you were on the boxcar, at B-1, you could see that, is that right?

A. No, sir, I couldn't see the highway across there, definitely.

Q. You could not. All right. Well, suppose you come down here, Mr. Bellamy, and mark on the diagram at what point you could see down there

(Testimony of William A. Bellamy.)

on the highway and could see all the way across the highway.

A. I believe that would be pretty well—(marking).

Q. All right. Now, you have drawn a line——

A. To the best of my judgment, it would be there.

Q. Now, we will draw a red line across. We will mark that B-3. All right. Now, you can resume your seat, Mr. Bellamy.

You could see the whole highway as far as B-3, could you?

A. I don't believe I could see the inside curve that far.

Q. Could you see the middle of the highway as far as B-3?

A. Well, the best of my judgment, on the map, I could see the middle of the highway, yes, sir.

Q. Now, do I understand you to say that you did not look across the highway into the area south of it at any part of this [116] territory between B-1 and B-3?

A. I didn't make no special purpose to look across that way.

Q. And your primary gaze or primary purpose in looking was to look at Quinlan, isn't that it?

A. Yes, sir, Quinlan. That was the man I was looking for.

Q. Were you expecting Quinlan to give you a signal?

(Testimony of William A. Bellamy.)

A. I wasn't expecting him to, but I never knew.

Q. Have you any idea at all as to what kind of a signal you might be getting from Quinlan on that kind of a move?

A. Well, that kind of a move, you never know. Something might happen on the rear end, some man can fall or something like that. He could give me a signal.

Q. Now, when you got off and ran 15 or 20 steps, it was your purpose to get down opposite where the switch was, is that right?

A. Yes, sir, that would give me a better view of around the curve.

Q. And it is correct that what you told Mr. Phelps the other day, that during the time that you were looking toward the engineer—that's right, isn't it?

A. After I started in my running movement, I was facing the engineer, yes, sir.

Mr. Bledsoe: Yes. I think that's all.

Mr. Digardi: No further questions. You may step down, Mr. Bellamy. [117]

Mr. Phelps: Just one second. I don't think I have any, but I was looking at some of the pictures. Where are the last ones you put in?

Mr. Digardi: I think the juror still has them.

Mr. Phelps: Oh, I see. That is why I couldn't find them. May I have just one moment, Your Honor?

(Testimony of William A. Bellamy.)

Recross-Examination

Q. (By Mr. Phelps: I do have one or two other questions about this picture, No. 37. I want to show you what has just been introduced as Plaintiff's Exhibit No. 37. Now, I call your attention in that picture to the location of the leading car—that is the car farthest away in this picture, or the boxcar next to the engine. Can you see where that is? A. Yes, sir, I see where that is.

Q. And just over a little road crossing, isn't it?

A. Yes, sir, there is a little road crossing.

Q. And that road crossing that is over there would be this little road crossing which is shown here, is that right?

A. That is about right, yes.

Q. All right. Let's mark that, then, if I may on this photograph so that we can identify it. I will draw an arrow down to that crossing and we will mark that on this photograph, 37, "B-1."

Have I correctly marked that as the little road crossing which is very near the frog of the switch?

A. This one, this road crossing, would be to the east of the switch.

Q. Just east of the switch?

A. East of the frog.

Q. East of the frog. And the frog of the switch is what point on the switch?

A. That is where you have your pencil. That would be the frog.

Q. Where the two inner rails cross?

A. Yes, sir.

(Testimony of William A. Bellamy.)

Q. Let's just mark that. I will put "frog." We have been using so many railroad terms.

All right. Now, then, Mr. Bellamy, if you will notice that picture you will see that it was taken with some cars on the spur. Do you not see the cars on the spur there?

A. It shows to be on the spur, yes, sir, if that is it.

Q. That is the track, of course, that you were on?

A. Yes.

Q. And there were three cars there. And then here is another little driveway here. Can you see that?

A. Is that the driveway you have been speaking about now?

Q. No, that is another driveway that I am pointing to. What driveway is that?

A. I only remember the one driveway in there.

Q. Only remember one. Well, perhaps we can refresh your recollection from some of the photographs you have identified. [119] I am handing you now Plaintiff's Exhibit No. 16. You will notice there are two driveways across here, one right over where your counsel has marked the letter M and another one further down by the frog. Does that refresh your recollection that there is, then, another crossing east of the switch?

A. Yes, sir, it shows two driveways in there.

Q. All right. Now, having refreshed your recollection and referring again to Plaintiff's Exhibit 37, can we identify the crossing shown on there as that

(Testimony of William A. Bellamy.)

crossing I have just indicated and that you have identified?

A. This would be the first one, that would be the second one, right here.

Q. All right. I will mark an arrow down to there, indicating the second crossing. Now, then, Mr. Bellamy, how far is it from those two crossings, to your best recollection? Do you know?

A. No, sir, I don't know, because I don't remember this one. I haven't a very good idea of the second crossing.

Q. Now, the second crossing is very, very close, is it not, to the shed itself? Isn't it?

A. I don't remember that second crossing very well, no, sir.

Q. Well, I will show you another picture. I will show you Plaintiff's Exhibit 18. Can you identify the second crossing in that picture?

A. Yes, sir, that shows a second crossing there.

Q. That does show the second crossing. And will you note, please, the location of that second crossing as right adjacent to the most westerly end of that shed—comes right into it?

A. It sure is on the picture.

Q. All right. Now, then, having that in mind, and noticing that this picture is taken, the boxcar positions where I have indicated, just over the first crossing, indicating that you can clearly see the second crossing; is it still your testimony, after looking at that picture, that your view from the point in here, either B-1 or back in by the frog,

(Testimony of William A. Bellamy.)

either way you want to put it, that you can not see down onto the highway to the point opposite that driveway, which is shown in that picture?

A. Yes, sir, you can see that.

Q. You can see it. You believe, then, that that photograph isn't speaking the truth, is that right, when it shows that view and shows both——

Mr. Hepperle: Objected to as argumentative, Your Honor.

The Court: Yes, I think that is argumentative. Sustain the objection.

Mr. Phelps: Yes, Your Honor.

Q. Well, at any rate, you do not change your testimony—this will not refresh your recollection?

A. I do not change my testimony, but a larger picture will show that more plainly than a smaller one.

Q. Well, may I ask you if this photograph was not taken, or [121] does not show the same type of boxcars as you had hold of?

A. It shows the same type of boxcar.

Q. Does it not show the boxcars in the same spur that you were riding out of at the time?

A. Yes, sir.

Q. And does it not show them in the approximate position you were at the time you dropped off?

A. Approximately, yes, sir.

Q. All right. So that you have identified this photograph yourself, have you not, Mr. Bellamy, on questions from your own counsel, as showing the view from that point? You have, have you not?

(Testimony of William A. Bellamy.)

A. Yes, sir.

Mr. Phelps: All right, no other questions.

Mr. Bledsoe: No further questions, Your Honor.

Mr. Hepperle: You may step down, Mr. Bellamy.

Morning Session, Wednesday, November 2, 1949, at 10:00 a.m.

The Clerk: Case of Bellamy vs. Southern Pacific Company and others, for trial.

Mr. Hepperle: Ready for the plaintiff.

Mr. Bledsoe: Ready.

Mr. Phelps: Ready.

Mr. Hepperle: With the court's permission, your Honor, we would like to call Dr. Leonard Barnard out of order.

The Court: All right.

Mr. Phelps: No objection.

LEONARD BARNARD

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name?

A. Leonard Barnard.

Direct Examination

By Mr. Digardi:

Q. Where do you live, Doctor?

A. I live at 55 Sharon Avenue in Piedmont, California.

Q. What is your business or profession?

A. I am a licensed physician, confining my practice to bone and joint surgery.

(Testimony of Leonard Barnard.)

Q. Are you duly licensed to practice your profession in the State of California? A. I am.

Q. And where do you maintain your offices?

A. At 2939 Summit Street, in Oakland.

Q. Doctor, will you give us somewhat of a background of your education and training?

Mr. Phelps: We will stipulate to the doctor's qualifications as an orthopedic surgeon.

Mr. Digardi: I think it might be well for the jury to hear the doctor's qualifications; there might be some problems in the minds of the jurors as to the medical evidence.

The Court: All right, I will permit you to proceed this way.

Q. (By Mr. Digardi): Will you answer the question, Doctor?

A. I graduated from Stanford University Medical School in 1927, was an assistant to Dr. N. Austin Carey from 1927 to 1929, and from '30 to 1935. In 1929 to 1930 I was a graduate student at the University of Iowa. I confined my practice to orthopedic surgery since 1930, and I am licensed by the American Board of Orthopedists as a specialist in orthopedic surgery and am a member of the Academy of Orthopedic Surgeons. I was formerly an instructor in orthopedic surgery at Stanford University Medical School. I am on the staff of the Providence, Alta Bates, Herrick, East Oakland, Alameda, Peralta Hospitals, and chief orthopedic surgeon at the Alameda County Institutions,

(Testimony of Leonard Barnard.)

and the Island, Fairmont and Del Valle Hospital, consultant in orthopedic surgery to the United States Veterans' [76] Administration, and to the Secretary of the United States.

Q. Doctor, will you tell the jury what orthopedic surgery consists of? What is that field of practice?

A. Orthopedic surgery primarily is the field of surgery concerned with bones and joints.

Q. Now, Doctor, have you examined at any time Mr. William Bellamy on behalf of the plaintiff?

A. I have examined him on two occasions, in July and again eight months ago.

Q. Calling your attention, Doctor, to the examination you made in July, what complaint did Mr. Bellamy make to you at that time?

Mr. Phelps: Objected to, if your Honor please —his complaints; unless it is understood that they are for the purpose of what the plaintiff told the doctor. Otherwise, it would be self-serving. But only for the purpose of his basing his opinion.

Mr. Digardi: That is the purpose, your Honor.

The Court: I will overrule the objection.

Mr. Phelps: Assuming he is basing a hypothetical question on that, we would have no objection.

The Court: I will overrule the objection.

Mr. Phelps: May it be understood that they are limited to that purpose, though, your Honor?

The Court: Yes. [77]

A. Mr. Bellamy stated to me that on July 27, 1949, he had pain in the left ribs and left shoulder

(Testimony of Leonard Barnard.)

and that it hurt him to cough and sneeze. He stated that he had no good use of his left shoulder and that there was pain behind the left shoulder and soreness in his left upper arm.

Q. (By Mr. Digardi): Did he give you a further history of the treatment that had been given him? A. Yes, sir.

Q. Would you state that, please?

A. He stated that he was injured on April 4, 1949, while at his work; he was struck by an auto and knocked to the street. He stated that he was out or unconscious for a short period and that he bled severely from a large cut on his left arm and that he had immediate pain in the left shoulder and chest as well. He stated that he was taken to the Southern Pacific Hospital in San Francisco, where he was given an anaesthetic and the arm wound was sewed up and a cast was applied about his shoulder, on account of a fracture of his left collarbone. He stated that this remained on for about two months and that he had not been able to work since the accident; that he had received some physical therapy to help build up the muscle power in his shoulder, but at the time of my examination or observation he was receving no active treatment.

Q. Did you make a physical examination of Mr. Bellamy? A. Yes, sir, I did. [78]

Q. And what were your findings on that examination?

(Testimony of Leonard Barnard.)

A. My physical examination revealed a medium height man five feet nine inches in height, who stood erect, thinly built, weighing 155 pounds. His general appearance is normal and his intelligence was average, answering questions clearly. His head showed a normal size and shape, thin growth of hair, but no evidence of injury or abnormality was noted. Face was normal, teeth were natural with much dental work. Throat: the tonsils were missing. His eyes: . . . pupil reacted normally. Ears: gross hearing was intact. His chest was symmetrical, except for some flattening in the lower left ribs at the level of the nipple line. Expansion, however, was good, and the lungs and heart sounds were clear. His blood pressure was 122/72. The ribs on palpation showed a definite thickening on the left at the level of the sixth and seventh ribs in the auxiliary or armpit line. His abdomen was flat, with good muscles, no masses or areas of tenderness, and there was a relaxed right hernial ring. His back; the patient stood in good balance and posture and exhibited a full range of motion in all directions, with the complaint of pain at the level of the second and third thoracic vertebrae, dorsally on the left side near the shoulder blade; but without any true muscle spasm. His leg signs were free and the pelvic, sacrum and coccyx appeared normal to me. In the upper extremities, in the neck, there were moderate complaints of tenderness on [79] palpation at the base, referable into the left shoulder region.

(Testimony of Leonard Barnard.)

In the shoulder joint, the right showed a full range of motion. In the left, the motions were restricted. Abduction, or moving the arm down from the side, was restricted at 110 degrees over 165 in his opposite good shoulder.

Q. Doctor, what do you mean by 110 over 165?

A. In judging range of motion about joints, we set them up as part of angles. When the arm is at the side, we would say it is at zero. When it is half way up, it is 90 degree angle; when all the way up, it would be 180 degrees angle. So the range would be in this man, 110, which would be 20 degrees up beyond a right angle, while the opposite side was 165, 15 degrees short of a straight line. Forward elevation, or moving the arms up forward from the side, was found to be restricted at 150, or 180 on the opposite side. In other words, *there* were 30 degrees loss of forward elevation. About the shoulder joint there was muscle atrophy noted in the deltoid or the bulging muscle (indicating).

Q. Doctor, will you describe what muscle atrophy is?

A. By "atrophy," we mean a shrinkage of a muscle. It loses its body and tone and is softer than a normal muscle.

Q. Will you continue?

A. The rotation motions: the inward and outward motions of the shoulder were normal. The clavicles or collarbones showed an irregularity on either side in the middle third of the [80] collar-

(Testimony of Leonard Barnard.)

bone, with tenderness on the left. The arms, on the left arm there was general diffuse atrophy of the musculature through the arm, in the lower third of the left arm, near the elbow there was a jagged, irregular laceration, healed, a scar on it, which started posteriorally and ran laterally and backwards a distance of five inches. The scar was quite deep and was bound down in part to the triceps muscle and into the muscle, the brachioradialis, which is an arm muscle, runs from the arm to the forearm at the elbow joint on the outer side. There was mild tenderness to percussion; that is, touching over the scar (indicating). The wrist joint in the right, there was an old deformity of a healed Colles fracture, but with a full range of motion. And the left was normal. In the hands, the grip as judged by a spring machine was, on the right, 240, as compared to 200 on the left. The patient stated to me that he was normally righthanded. The finer movements were normal. In the lower extremities, there is generally normal and equal and free movement, except for some evidence of old injury involving the right knee, with some crepitation and thickening and moderate limitation of flexion on bending. The examination of his nervous system was normal.

Q. Did you have X-rays at your office, Doctor?

A. Yes, sir, I did.

Q. Did you personally supervise the taking of those X-rays? [81] A. I did, sir.

Q. And what did you find on X-ray examination of Mr. Bellamy?

(Testimony of Leonard Barnard.)

A. I took an anterior-posterior front-to-back view of his left shoulder, which revealed a healing fracture of the clavicle or collarbone in the mid third, with comminution. That is multiple fragments. And with some overlapping and shortening, estimated at three fourths of an inch. I took views of his left chest, and these disclosed fractures of the sixth, seventh and eighth ribs in the axillary line; the position of the sixth and seventh was generally good, but that of seventh—I mean the sixth and the eighth was good, but that of the seventh was healed with some overlapping. I took a lateral view of his cervical dorsal spine; that is the base of the neck and upper part of the chest. This disclosed some arthritic changes, some roughening and spur formation, but no fractures were found.

Q. Doctor, from the history given you by the plaintiff and from your examination of him and the X-rays that you took, did you make a diagnosis?

A. I did.

Q. Will you state that, please?

A. I came to the conclusion that this man had, first, suffered a comminuted fracture of his left collarbone; that he had been fractured at the sixth, seventh and eighth ribs in the left [82] chest; that he had suffered a severe laceration with some tissue loss from the left lower arm.

Q. Doctor, did you have an opinion at that time as to what his condition was as a result of this accident?

(Testimony of Leonard Barnard.)

A. Yes, sir, I did.

Q. Will you state that, please?

A. I felt at this time, in July—July 27, 1949—that the man still showed persistent weakness in his left arm, which I believe would be justified from the severity and multiplicity of his injury. I felt that the laceration of his arm was of such depth that it involved the muscle structures at the site, and therefore had produced some deep scarring with resulting weakness, which will in part be permanent. The fracture of the clavicle, I felt, would be clinically—in other words, to palpation or observation—healed, with some shortening and overlapping. Residually in the shoulder, as a result of the trauma and immobilization necessary for his treatment, there persisted a mild restriction of motion. This, however, I felt would clear. With reference to the complaints in his upper back and neck, I felt they were justifiable on the basis of his shoulder fracture and secondary strain to the muscle structures. By that I mean the mechanism of trauma, being struck hard enough on the shoulder to fracture the collarbone and the ribs. The back, I felt, must have sustained some injury as well. [83]

Q. Doctor, did you have an opinion at that time as to whether or not Mr. Bellamy was able to return to his duties as a railroad brakeman?

A. I felt at that time that this man was not ready to return to his duties as a railroad brakeman. I did not believe that he had sufficient power or use of his left arm to do this occupation safely.

(Testimony of Leonard Barnard.)

Q. Doctor, did you make a physical examination of Mr. Bellamy? A. I did, sir.

Q. At what time?

A. On October 25, 1949.

Q. What did you find his condition to be at that time?

A. At this time the man was still complaining of weakness and limited motion in his left arm and shoulder. I found that his range of motion in the shoulder joint had improved, but not markedly. He could now move his arm ten degrees farther from the side than before, but still lacked 45 degrees of a normal range of what we call abduction. I found that the forward range of motion in the upward plane was the same as at my examination of July, 1949. In the elbow joint I found that the scar of the laceration had thickened considerably since my first observation, and I found that there was at this time some limitation in flexion at the elbow, of ten degrees. In other words, he couldn't have bent his arm up as far as he can in the opposite arm, the right arm, by ten degrees. At this [84] time he was still complaining of pain referable to the base of his neck and of some pain on compression of his ribs. But otherwise, the findings were essentially as at my examination of July.

Q. At that time, Doctor, did you have an opinion as to whether or not Mr. Bellamy was able to return to his duties as a railroad brakeman?

A. I felt that this man was not yet ready to

(Testimony of Leonard Barnard.)

return to duty as a railroad brakeman. I felt that he is going to show some improvement, and that his muscle power will improve in this arm, but I still feel that he is too uncertain and weak to hazard the occupation which he normally follows. I felt that probably that should go on for another two to three months, at least, before we should try it.

Mr. Digardi: May it be stipulated, gentlemen, that these are the X-rays of the Southern Pacific General Hospital relating to the care and treatment of Mr. Bellamy?

Mr. Bledsoe: I assume they are. Are those the ones that were in the deposition?

Mr. Digardi: These are the ones that were attached to the deposition.

Mr. Bledsoe: Yes.

Mr. Phelps: Yes.

Mr. Digardi: Will you mark these, Mr. Clerk?

The Clerk: As one exhibit? [85]

Mr. Digardi: As one exhibit. Then we can mark the others as we use them.

The Clerk: I will mark the envelope containing the X-rays plaintiff's exhibit 27 for identification.

(Whereupon envelope of X-rays referred to above was marked plaintiff's exhibit No. 27 for identification.)

Mr. Digardi: May it be stipulated, gentlemen, that I have here the hospital record of the Southern Pacific General Hospital relating to the care and treatment of Mr. Bellamy while a patient at that hospital?

(Testimony of Leonard Barnard.)

Mr. Phelps: Well, are those the records that were returned by the notary on the taking of the deposition?

Mr. Digardi: These are the records that were returned by the notary attached to the deposition.

Mr. Phelps: Stipulate that those are the records that were returned by the notary. I assume that they are the hospital records, but I don't want to stipulate that they may go into evidence at this time, yet.

Mr. Digardi: May they be marked for identification, your Honor?

The Clerk: The record is marked Plaintiff's exhibit 29 for identification, the supplemental report is marked plaintiff's exhibit 30 for identification.

(Whereupon hospital record and supplemental record referred to above were marked plaintiff's exhibit 29 and 30, [86] respectively, for identification.)

Q. (By Mr. Digardi): Doctor, I show you plaintiff's exhibits 27 and 28—or 29 and 30 for identification, and ask if you have had an opportunity to review those records.

A. I did, just this morning, yes, sir.

Q. Thank you, Doctor. I show you plaintiff's exhibit 27 for identification, which is an envelope containing X-rays. Have you had an opportunity to review those X-rays? A. Yes, I have.

Q. Doctor, I think you might at this time, with his Honor's permission, demonstrate what these X-rays show, to the jury.

(Testimony of Leonard Barnard.)

A. I have here an X-ray marked "William Bellamy," under the date of April 5, 1949, which is an antero-posterior view of the left shoulder and chest. This shows primarily the fracture of his left collarbone, this being the shoulder bone and this the neck, and these the lower ribs, the upper ribs, rather (indicating). Here is noted in the mid third a separation of the two bones, with one large, loose piece torn off at an angle. The rib fractures do not show well here, but are just visible in the lower pole.

Q. One moment, Doctor.

Mr. Digardi: Mr. Clerk, will you mark that the proper subdivision?

The Clerk: Mark this separately?

Mr. Phelps: May we have the date of that X-ray? [87]

Mr. Digardi: The doctor gave the date.

Mr. Phelps: I didn't hear it.

The Witness: April 5.

The Clerk: Exhibit 28 in evidence.

Mr. Digardi: Did you want to mark each one separately or subdivisions?

The Clerk: 27A in evidence.

(Whereupon X-ray film referred to above, dated 4/5/49, was received in evidence and marked plaintiff's exhibit 27A.)

A. (Continuing) I have here an X-ray dated April 5, 1949, marked "William Bellamy," and views disclosing the lower rib of the left chest. The

(Testimony of Leonard Barnard.)

fractures can be noted at this level here and here (indicating); that being the seventh and eighth ribs in the lateral angle. This is the vertebra and this is the pelvic bone (indicating).

Mr. Digardi: Mr. Clerk, will you mark that 27B?

The Clerk: 27B in evidence.

(Whereupon X-ray film referred to above, dated 4/5/49, was received in evidence and marked plaintiff's exhibit 27B.)

A. (Continuing) I have here a view dated April 4, 1949 and marked "William Bellamy," and a view of the left elbow joint, taken in the anterior-posterior plane with the arm in this position (indicating). And the film is beneath the arm. These little ones being the two bones of the forearm, and the shoulder joint would be in this relative position. Then the arm comes [88] down. On the other side the bony structures are normal, but on the other side here (indicating), the soft tissues, including the muscles and skin, can be noted to be markedly disrupted and to have lost their normal form as compared to, say, the straight line which is seen here on the inner side of the elbow joint—indicating considerable damage within the tissues of a soft nature on the outer aspect of the left elbow.

Mr. Digardi: Mr. Clerk, will you mark that 27C?

The Clerk: Yes, 27C in evidence.

(Testimony of Leonard Barnard.)

(Whereupon X-ray film referred to above, dated 4/4/49, was received in evidence and marked plaintiff's exhibit 27C.)

A. (Continuing) I have here a lateral view of Mr. Bellamy's arm, dated April 4, 1949, which shows normal bone and joint structures, this being the arm bone and this the forearm bone or bones (indicating). Here the defect in the soft tissues is noted somewhat posteriorally, but this view does not bring out that very clearly.

Mr. Digardi: 27D.

The Clerk: 27D in evidence.

(Whereupon X-ray film referred to above, dated 4/4/49, was received in evidence and marked plaintiff's exhibit 27D.)

A. (Continuing) I have here an antero-posterior view of the left shoulder of William Bellamy, dated April 19, 1949, disclosing the position of the fractured collarbone at this time, with some shortenings; the free fragment lying in this plane and the two bones overlapping a distance of approximately three fourths of an inch (indicating).

Mr. Digardi: Mr. Clerk, will you mark that 27——

The Clerk: 27E, in evidence.

(Whereupon X-ray film referred to above, dated 4/19/49, was received in evidence and marked plaintiff's exhibit 27E.)

(Testimony of Leonard Barnard.)

A. (Continuing) I don't see any point in showing all of these. They are just duplications at later dates, I think.

I have here an antero-posterior view of the left shoulder, dated October 3, 1949. This shows the fracture of the collarbone. It is now smoothed off and rounded, and the density above it indicates bone healing. We can see only one of the ribs showing at this plane here in the lower pole, with considerable healing about the swelling.

Mr. Digardi: Plaintiff's exhibit 27F in evidence.

The Clerk: 27F in evidence.

(Whereupon X-ray film referred to above, dated 10/3/49, was received in evidence and marked Plaintiff's exhibit 27F.)

Mr. Digardi: Doctor, do you have there an X-ray of Mr. Bellamy's left shoulder, taken in 1945?

A. Yes, this X-ray is dated October 5, 1945, marked "William Bellamy," and marked "left shoulder," showing his normal collarbone at that time, and the shoulder bone and his rib structures.

Q. Doctor, would you take one of these other X-rays showing the [90] fracture of the shoulder and put it in so the two can be compared, the normal shoulder with the fractured shoulder? You have plaintiff's exhibit 27A?

A. This is the left shoulder, dated April 5, 1949; this is October 5, 1945 (indicating). You may see the fracture at this side, the bone of the shoulder

(Testimony of Leonard Barnard.)

being intact in this position. And then in October of '45——

Mr. Digardi: Mr. Clerk, will you mark this October 1945 picture as plaintiff's exhibit next in order?

The Clerk: Plaintiff's exhibit 27G in evidence.

(Whereupon X-ray film referred to above, dated 10/5/45, was received in evidence and marked plaintiff's exhibit 27G.)

A. (Continuing) I have here an X-ray of the lower ribs, dated October 3, marked "William Bellamy," and the fractures of the ribs, I believe, can be seen in these two, which we previously saw, healed. This one was some overlapping, and this one in generally pretty good position. This is 8, there is a fracture also noted in other X-rays of 6, and this is 7 that is overlapping (indicating). This is a semi-lateral view with the spine being shown here (indicating).

Q. Now, Doctor, do your own X-rays show anything that these X-rays do not show?

Mr. Phelps: Well, object to that on the ground that would be a conclusion without the best evidence.

Mr. Digardi: Merely for the purpose, your Honor, of [91] determining whether or not he needs to show his X-rays to the jury.

Mr. Digardi: This is the last one, plaintiff's exhibit next in order.

The Clerk: Plaintiff's exhibit 27H in evidence.

(Testimony of Leonard Barnard.)

(Whereupon X-ray film referred to above, dated 10/3/49, was received in evidence and marked plaintiff's exhibit 27H.)

A. (Continuing): The only thing that I have here that would prove it is that this X-ray shows the fracture of the sixth rib as well; it was made in my office under date of July 27, 1949, in an antero-posterior view of Mr. Bellamy's left chest. You see here the sixth rib fracture is not yet solid. The seventh rib is healed with some overlapping, the eighth rib is healed in generally pretty good position.

Q. Before we go ahead, may I have your whole envelope marked?

Mr. Digardi: Mr. Clerk, I have here an envelope containing the X-rays taken by Dr. Barnard as previously referred to. Would you mark those as plaintiff's next number in order?

The Clerk: The envelope is marked Plaintiff's exhibit 28 for identification.

(Whereupon envelope of X-rays referred to above was marked plaintiff's exhibit No. 28 for identification.)

Mr. Digardi: And will you mark this X-ray the doctor has just demonstrated to the jury as plaintiff's exhibit 28A?

The Clerk: Plaintiff's exhibit 28 in evidence.

(Whereupon X-ray referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28A.)

(Testimony of Leonard Barnard.)

A. (Continuing) I believe these others just show the same healed clavicle as I showed in the last one.

Q. Doctor, do you have an X-ray showing the neck that you have mentioned?

A. This is an oblique view of the base of the neck and upper spine, made in my office on July 27, 1949, which does disclose some mild roughening about the anterior portion of the bodies, and some calcification of a minor degree which we would term a mild arthritic type of spine. But that is about all it does show.

Q. Thank you, Doctor.

Mr. Bledsoe: May we see the clavicle as of that date?

Mr. Digardi: Will you mark this plaintiff's next in order?

The Clerk: Plaintiff's 28B in evidence.

(Whereupon X-ray film referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28B.)

A. (Continuing) This is an anterior-posterior view of Mr. Bellamy's left shoulder, made in my office July 27, 1949. Here is the fracture of the collarbone or clavicle, as previously noted. This is that spicule which we noted as sticking downward, still in position (indicating). You will note that the collarbone is shortened, approximately, in my estimation, three fourths of an inch, with some overlapping; but in general [93] rounding off to what we call healing or union of the fracture.

(Testimony of Leonard Barnard.)

Mr. Digardi: Mr. Clerk, will you mark this photograph as plaintiff's exhibit next in order?

The Clerk: Plaintiff's exhibit 28C in evidence.

(Whereupon X-ray film referred to above, dated 7/27/49, was received in evidence and marked plaintiff's exhibit 28C.)

Mr. Digardi: And we offer in evidence as plaintiff's exhibit 27 the envelope containing the remaining X-rays which were not demonstrated, but we offer them all in evidence. And also plaintiff's exhibit 28.

The Clerk: 28 for identification.

The Court: It may be admitted.

The Clerk: Exhibits 27 and 28 in evidence.

(Envelopes referred to above were received in evidence and marked plaintiff's exhibits 27 and 28, respectively.)

Q. (By Mr. Digardi): Now, Doctor, you admitted that on Mr. Bellamy's last visit, you found a condition with reference to the scar on his left arm where the laceration was?

A. Yes, I found that the scar had thickened.

Q. Could you demonstrate that to the jury, please?

(To the Plaintiff): Mr. Bellamy, would you step forward, please?

(Whereupon the plaintiff came forward and stood in front of the jury box, and the doctor

(Testimony of Leonard Barnard.)

left the witness stand and stood facing the plaintiff in front of the jury box.) [94]

Mr. Digardi: Remove your coat, please.

(Plaintiff removed coat and rolled up sleeve.)

Mr. Digardi: Will you step up forward here where the jury can see better?

A. (Continuing): The thickening of the scar is in this level, the lower fold or pole, here, and it is quite hard compared to the scar, as you noted on the opposite side of it. I think that is the tendency to what we call keloid or the thickening of scars, which sometimes continues and has to be removed. He also has some localized tenderness at one fold here, indicating to my mind—and also some numbness below it—that he has severed a small cutaneous nerve at this part. The defect in the muscle, I think, is very readily seen, because that is raised again (indicating). Normally there should be a muscle of considerable size, and at this level, which runs between the arm and joint. He demonstrates some limitation of flexion compared to his opposite arm.

(To the Plaintiff): Bring that hand right down. He can bring this hand down easy, this one he can relax; with force, this one he doesn't quite come down. He has full power, but the scar tends to tighten.

Mr. Digardi: Thank you, Doctor. You may resume your seat, Mr. Bellamy.

(Witness resumed the witness stand and plaintiff resumed his seat in the courtroom.)

(Testimony of Leonard Barnard.)

Q. Doctor, on plaintiff's exhibit 29 for identification, there is an operation record in the hospital record. Have you observed that record of operation?

A. Yes, sir, I have; this morning.

Mr. Phelps: May I see it, see what it is?

(Document examined.)

Q. (By Mr. Digardi): Doctor, will you read the portion which states, "Procedure under the operation to the injury——"

Mr. Phelps: May I see, if your Honor please, so the record will be clear? I have no objection to the portion he is now offering of the hospital records. I would have objection to portions of them, possibly. I would like an opportunity as they are offered to state them. I don't want to be understood as now conceding that the whole record is proper.

The Court: You are not objecting to this part?

Mr. Phelps: No, your Honor.

A. (Reading):

"Under satisfactory pentothal anaesthesia, the skin of the left arm was cleansed with ether, soap and water, and merthiolate. The laceration itself was thoroughly cleansed with soap, water and irrigated with saline solution. Examination of the traumatized area revealed laceration of the muscle bellies of the brachialis anterior and the flexor carpi radialis. There was no evident damage to [96] any tendons, major nerve or major blood vessel. The wound was debrided, removing a considerable quantity of devitalized skin, fat and muscle. Muscle

(Testimony of Leonard Barnard.)

fascia was approximated with a few sutures of 0 plain catgut, the skin was closed with interrupted sutures of medium dermalon after a tissue drain was placed in the wound. The arm was placed in ten degrees flexion of the elbow, immobilization being obtained by means of molded posterior plaster splint."

Q. Doctor, it states here that a considerable quantity of devitalized skin, fat and muscle was removed. What is the effect of that?

A. Well, that would be permanent loss of that tissue in the man's body. If you remove a portion of a muscle, you weaken that muscle.

Q. Now, Doctor, in your opinion, based on what Mr. Bellamy told you, what you found on your examination of him, what you found in the X-rays you took in your office and what you found as a result of your review of the hospital records and X-rays of the Southern Pacific General Hospital, will Mr. Bellamy have any permanent disability as a result of this accident?

Mr. Phelps: Well now, the only objection I want to call to your Honor's attention is the inclusion of all the hospital records, which are, of course, not yet in evidence; and I object [97] to it if he includes that.

Mr. Digardi: Well, if that is all, I offer in evidence the record of the Southern Pacific General Hospital as plaintiff's next.

The Court: I don't think it is necessary to put

(Testimony of Leonard Barnard.)

that record in evidence. If the doctor has seen the record, it has been identified by him, and he said he had read it over and it has been stipulated that that was the record.

Mr. Phelps: Certainly, your Honor.

The Court: So I don't see any necessity to put it in evidence unless you have some particular thing. He can base his opinion upon the record as well as the other facts that were given.

Mr. Phelps: Very well, your Honor.

Mr. Digardi: Would you answer the question, please, Doctor?

A. My opinion, based on the examination of this man and his history, and the X-rays, is to the effect that he will have permanent disability, which I would itemize as follows: First, he is going to have some permanent limitation of motion in his shoulder joint. I do not believe it to be quite as great as at the present time, but it will be, I should say, 20 per cent loss of shoulder motion; second, he is going to have permanent shortening of his collarbone, with a permanent knob or deformity on the left, which, while not especially disabling, [98] is a permanent condition. He is going to have some permanent weakness with reference to the function of his left elbow joint, owing to the fact that he lost considerable of the muscle structures which function to move the elbow joint. He is going to have also a small degree of skin anaesthesia below the scar, owing to the fact that the laceration cut some of

(Testimony of Leonard Barnard.)

the nerves to the skin in that area. I believe that summarizes it.

Q. Doctor, in your opinion, will he have any permanent weakness of the left arm?

A. He will have permanent weakness in the left arm, secondarily; first, some shortening of the collarbone and some changes in the shoulder joint from long periods of being held still. Second, some loss of muscle structure is noted in the scar of his elbow.

Q. Doctor, you mentioned he had a certain condition with reference to his neck or back between the shoulders. To what do you attribute that?

A. I attribute that primarily to the trauma of his accident. I think a forced blow, striking an elbow and shoulder hard enough to fracture the collarbone and break several ribs, must also transmit some force to his neck and back. I do not believe, however, from my examination, that that will be of a permanent nature.

Mr. Digardi: Thank you, Doctor. I believe that is all. [99]

(Upon the plaintiff being excused, the following occurred.)

Mr. Digardi: Mr. Bledsoe, may it be stipulated that Mr. J. E. Carlson was the driver of the car, the pickup truck that ran into Mr. Bellamy, and that at the time of the accident he was an employee of the Pacific Portland Cement Company and acting within the scope and course of his employment?

Mr. Bledsoe: Yes, with the exception of the inference that he ran into the man. It may be a quibble, but without reference to who ran into whom, we will stipulate that the man was driving in the scope of his employment on behalf of the Pacific Portland Cement Company.

Mr. Digardi: Thank you, Mr. Bledsoe.

Mr. Hepperle: Mr. Edwards, will you come forward, please?

FRANK G. EDWARDS

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the court and jury?

A. Frank G. Edwards.

Direct Examination

By Mr. Hepperle:

Q. Where do you live, Mr. Edwards?

A. 2175 Twelfth Avenue.

Q. And who do you work for?

A. Southern Pacific Company. [157]

Q. In what capacity?

A. Locomotive engineer.

Q. How long have you worked for the Southern Pacific in that capacity? A. 24 years.

Q. How long have you been a locomotive engineer? A. Eight years.

Q. On April 4, 1949, you were working down at Redwood City along the harbor road at about 5:35 p.m.? A. That's right.

Q. Who was the conductor?

(Testimony of Frank G. Edwards.)

A. George Lechner.

Q. And do you recall the names of the other members of the crew?

A. Husson and Quinlan and——

Q. Mr. Bellamy?

A. And Mr. Bellamy and the fireman.

Q. Now, directing your attention to about 5:35 p.m., and a movement out of the spur going into the paraffine plant, do you recall such a movement?

A. Yes, sir.

Q. Who was in charge of the movement at the time? A. Excuse me. Mr. Husson.

Q. Mr. Husson? A. Husson.

Q. And in charge of the movements of the train generally? [158] A. Mr. Lechner.

Q. Mr. Lechner, the conductor. How many cars did you have ahead of the engine?

A. Three.

Q. And how many behind? A. Two.

Q. And you were in the cab of the engine on the right side next to the road?

A. That's right.

Q. Were you able to see any members of the crew from your position?

Mr. Bledsoe: At what time?

A. As you were backing out of the spur?

Mr. Phelps: At what point on the spur? May I ask that the question be tied down to the particular point?

The Court: Yes, I think you had better place the point.

(Testimony of Frank G. Edwards.)

Q. (By Mr. Hepperle): At any point while you were backing out of the spur, Mr. Edwards, were you able to see any other members of the crew?

Mr. Phelps: Well, that is indefinite.

The Court: I don't think so. I will allow it.

A. Mr. Bellamy on the point of the car nearest the engine, and the conductor across the road on the shoulder of the highway, south side of the road.

Q. Were you able to see Mr. Quinlan? [159]

A. No.

Q. State whether or not there is a curve at that point. A. There is.

Q. Did it obstruct your view? A. Yes.

Mr. Phelps: Now I will object to that once again, if your Honor please, as to what particular point. I think we are getting into something. We ought to tie it down somewhere. When you are getting into an obstruction to the view. I will object upon that ground, that it is indefinite and uncertain.

The Court: Yes, I think you ought to make that point more definite.

Q. (By Mr. Hepperle): Looking toward the east, Mr. Edwards, would you state whether or not the curve obstructing your view——

Mr. Phelps: At what point on the curve, is my point, your Honor.

Mr. Bledsoe: And his view of what? I would like to know. His view might be obstructed over to the left and not to the right.

(Testimony of Frank G. Edwards.)

The Court: Well, you can bring that out on cross-examination. I will allow the question.

Q. (By Mr. Hepperle): You may answer, Mr. Edwards.

The Court: You were on a curve, it is a rather continuous curve no matter where you are.

Mr. Phelps: I shan't comment. I thought the curve wasn't [160] the same by the diagrams, your Honor. That is the reason I made the objection; it wasn't a consistent, straight curve.

The Court: Well, it was a curve, apparently, by the diagram—but that is for the jury to determine.

A. My view was obstructed.

Q. (By Mr. Hepperle): And how about looking toward the west from the cab of the engine?

A. Yes, it was obstructed there.

Q. In other words, your view was obstructed both ways by the curve? A. Yes.

Q. Now you have mentioned Mr. Bellamy riding the end of the car at the front of the engine. Where on the car was he riding?

A. On the short ladder immediately in front of the engine.

Q. Did you have your eye upon him as you backed out of the spur? Were you watching him?

A. Yes.

Q. Did you see him do anything? Did you see him leave the car? A. Yes.

Q. Will you state whether or not he left the car in the regular manner? A. Yes.

(Testimony of Frank G. Edwards.)

Mr. Phelps: Objected to as calling for the opinion and conclusion of the witness, asking him what he did, what he saw him do, but not the "regular manner"; it is calling for an [161] opinion and conclusion.

The Court: Well, it is somewhat leading, but I will allow it.

Mr. Phelps: And leading.

Q. (By Mr. Hepperle): Did you see what he did after he left the car? Mr. Bellamy?

A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating).

Q. State whether or not this was in accordance with the usual procedure at that point.

Mr. Phelps: I will object to that as incompetent, irrelevant and immaterial—the usual procedure at that point.

Mr. Hepperle: The man is an expert railroad man, your Honor.

Mr. Phelps: Well, anything might cause—I don't know that that is proper, your Honor.

The Court: That is calling for his conclusion.

Mr. Phelps: It is calling for an opinion and conclusion and leading and suggestive.

The Court: Just reframe the question.

Q. (By Mr. Hepperle): Will you state whether or not, Mr. Edwards, there was anything unusual in the position taken by Mr. Bellamy?

A. No.

(Testimony of Frank G. Edwards.)

Q. What was the next thing that you noticed? We had gotten [162] you up to the point where Mr. Bellamy was in the road passing signals to you. What happened next?

A. This truck came around the corner, around a curve from the east.

Q. Did you have a chance to estimate its speed?

A. Around 30 miles an hour.

Q. What happened next?

A. Mr. Bellamy was facing the engine. He didn't see the truck the truck driver swerved to the south side of the road to try to prevent hitting Mr. Bellamy, and the rear end, the rear fender, caught Mr. Bellamy in the back.

Q. Now, let's back up just a moment. As the car came around, or as the truck came around the curve, where was it in the road? That is, which lane was it in, or would you just tell us where it was?

A. In the lane going toward Redwood City; it would be the north lane.

Q. In the north lane?

A. North lane, yes.

Q. Between the center line and the north edge of the road? A. That's right.

Q. And it continued on toward Mr. Bellamy?

A. It swerved toward the center. The driver swerved toward the center when he saw Mr. Bellamy.

(Testimony of Frank G. Edwards.)

Mr. Bledsoe: We move to strike the conclusion as to what [163] the driver saw.

Mr. Hepperle: That may go out, your Honor.

The Court: The statement, "When he saw Mr. Bellamy," may go out. The rest of the answer may remain in.

Q. (By Mr. Hepperle): The point I am getting at, Mr. Edwards, is, how far was the truck from Mr. Bellamy at the time that it began to swerve?

A. Oh, a distance of about 20 feet.

Q. What happened next?

A. Oh, the rear end struck Mr. Bellamy in the back and tossed him into the road between the cars and the truck itself.

Q. Did you hear any sound of any horn from the truck before the collision?

A. None whatsoever.

Q. Did you hear any other warning of any type?

A. No.

Q. Did you see whether or not the brakes were applied on the truck? A. Yes.

Q. At what point were the brakes applied, or when?

A. After Mr. Bellamy had been struck, there were skidmarks on the road.

Q. About how long were the skidmarks?

A. About 30 feet.

Q. And what was the condition at that time in respect to [164] visibility?

(Testimony of Frank G. Edwards.)

A. It was broad daylight.

Q. And as to visibility, was it good or bad otherwise? A. Very good, clear.

Q. What, if anything, did you do after the collision took place?

A. I climbed down off the engine and went over to the driver's side of the truck and took the information on the registration card on the steering post.

Q. And after you had done that, did you see where the driver was?

A. He was in the neighborhood of the truck there.

Q. Did you go up to him?

A. He spoke to me, said that he was in a hurry to get to the post office with the mail.

Mr. Hepperle: Will you mark these two pictures, Mr. Clerk? Two pictures from the group formerly marked altogether as exhibit AA?

The Clerk: These are going to be your exhibits, are they not?

Mr. Hepperle: Yes.

The Clerk: Marked 39 and 40 for identification.

(Whereupon photographs referred to above were marked plaintiff's exhibits 39 and 40 for identification.)

Q. (By Mr. Hepperle): I show you exhibit No. 40, Mr. Edwards, and ask you if that is the truck involved in the accident. [165]

(Testimony of Frank G. Edwards.)

A. That was the truck—I think it is; it is very similar to that, anyway. I am not positive whether it is another truck or not.

Mr. Hepperle: We offer in evidence plaintiff's exhibit No. 40.

The Court: It may be admitted.

The Clerk: Plaintiff's No. 40 in evidence.

(Whereupon plaintiff's exhibit No. 40 for identification was received in evidence.)

Q. (By Mr. Hepperle): I show you plaintiff's exhibit No. 39 (handing to witness), and ask you whether the mark shown in the picture is the skid-mark you have previously referred to.

A. It is just about where it was.

Mr. Hepperle: We offer plaintiff's exhibit No. 39 in evidence. I will show it to the jury.

The Clerk: No. 39 in evidence.

(Whereupon plaintiff's exhibit No. 39 for identification was received in evidence.)

Mr. Phelps: Does the record indicate, or can it indicate, when those last pictures were taken?

Mr. Digardi: I think Mr. Bledsoe may be able to state.

Mr. Bledsoe: There is a date on the back; they were taken the 6th of April, 1949, two days after the accident happened.

Q. (By Mr. Hepperle): I show you plaintiff's exhibit 31 for [166] identification, Mr. Edwards, and ask you if that indicates in a general way the

(Testimony of Frank G. Edwards.)

view from the engine, from the cab of the engine?

A. In a general way, yes.

Mr. Hepperle: We offer in evidence plaintiff's exhibit No. 31, your Honor.

The Court: It is already in.

Mr. Hepperle: Mr. Phelps objected to it on a prior point, your Honor.

Mr. Phelps: No, I have no objection as long as it is now qualified with a foundation. None at all. My only point is, may the record show, will you bring out from the witness, at what point it shows his view? In other words, my understanding is that, and I think the picture will clearly show, the front end of the pilot was at about the frog at that time, about at the switch stand at that time.

Mr. Hepperle: Could we further stipulate, Mr. Phelps,——

Mr. Phelps: And Mr. Edwards was the engineer when the picture was taken, so you can ask him. Bring it out from him.

The Court: Well, the point is, you called it exhibit 31. If it is not in evidence, then it must be for identification. If it is in evidence, there is no need in putting it in again.

Mr. Phelps: It was for identification.

Mr. Hepperle: I should have stated, your Honor, it was exhibit 31 for identification. [167]

Q. I show you the picture again, Mr. Edwards, and ask you if you know from what point the picture was taken; that is, how far from the engine, if at all?

(Testimony of Frank G. Edwards.)

A. You mean where the camera man was standing?

Q. Yes.

A. Oh, he had his camera right on the edge of the road, on the pavement.

Q. And where in relation to the side of the engine?

A. On the pavement, probably part on the pavement and part on the ground.

Q. And at a higher point in the cab of the engine, would you be able to look out and have the same view, or is this picture out from the engine, further out from the engine than you were heading?

A. He would see more than I would see—the camera would show more than I would see. (Photograph handed to the jury.)

Mr. Hepperle: So that the record may be clear, your Honor, may we reoffer exhibit 31 for identification into evidence at this time?

Mr. Phelps: I have no objection except, can we establish where the front end of the locomotive was at the time it was taken? That is all I would like to have you do. If you can't, all right.

Q. (By Mr. Hepperle): Can you tell us where the front end of the locomotive was, Mr. Edwards?

A. Right on the switch. [169]

Mr. Phelps: Thank you. No objection.

The Court: Well, the document will now be admitted in evidence and marked plaintiff's exhibit 31.

(Whereupon plaintiff's exhibit No. 31 for identification was received in evidence.)

(Testimony of Frank G. Edwards.)

Mr. Hepperle: You may cross-examine.

The Court: Before we start in, we will take the usual recess; ten minutes, ladies and gentlemen. During the recess will you bear in mind the admonition this court has heretofore given you.

(Recess.) [169]

Mr. Hepperle: With your Honor's permission, I should like to ask a couple of additional questions. Mr. Edwards, are you familiar with the traffic on Harbor Road in the vicinity of this accident?

A. Yes.

Q. Will you state what it was?

A. About normal, medium.

Q. What did the traffic consist of?

A. Cement trucks and trailers.

Q. You have already told the Court that you had two cars behind the engine and were backing out of this spur and that your view was cut off. Will you state whether or not there was anyone at the rear of the train as you were backing?

A. No.

Mr. Hepperle: You may cross-examine.

Afternoon Session, November 2, 1949

Cross-Examination

By Mr. Phelps:

Q. Mr. Edwards, if I understand correctly, you were coming out on this spur with three cars, and at the time you were coming out of here your con-

(Testimony of Frank G. Edwards.)

ductor, you state, was in a position south of the road, is that correct? A. That is correct.

Q. And can you tell us about where, with relation to the switch, approximately?

A. Almost opposite the switch.

Q. Almost opposite the switch? A. Yes.

Q. A little east or a little west?

A. More than likely a little east.

Q. A little east, and off the pavement entirely?

A. There is sort of a ridge on the side of the road, and he was standing on that ridge.

Q. Sort of a little mound?

A. A little mound.

Q. In a position, then, where he could see both ends of his cut of cars?

A. That is right.

Q. Is that right? A. That is right. [123]

Q. And he was in that position, was he not, in order to pass signals and direct that movement, wasn't he? A. That is right.

Q. And he was in a position, because of this curve, stationed himself in that position so he could see the front end of the train, the rear end of the train, and see his men? A. That is right.

Q. All right. Then do you remember whether he gave a signal to start that movement?

A. No, the signal was given by Mr. Husson to start the movement out of the plant.

Q. You don't remember whether he relayed it?

(Testimony of Frank G. Edwards.)

A. No.

Q. You don't remember. Then as you were backing up, then, you were to take your signals from Mr. Lechner, the conductor, as well as any other man in that crew, were you not?

A. That is right.

Q. He at all times during this entire movement, as far as his position was concerned, remained in your view, didn't he? A. That's right.

Q. So that you could always see him and he was in a position to pass any signals from any man on the crew, was he not? A. That is right.

Q. And he was in a position to pass any signals whether any other man in that crew disappeared from his view or not; isn't [124] that true?

A. That is right.

Q. Now, then, in such circumstances, having in mind the custom and practice of railroading in such circumstances, and having in mind any rule, including Rule 7-B, a portion of which has been read into evidence, can you tell us whether or not when Mr. Bellamy dropped off the engine or the car, and if he had then stayed where he was and then had disappeared from your view, can you tell us whether or not as an engineer of that locomotive, you would then have stopped?

A. We are not required to stop.

Q. No. In other words, you are not required to stop when a man disappears from your view when he is behind you in the direction of movement?

(Testimony of Frank G. Edwards.)

A. No.

Q. The only time you are required to stop is when a man disappears from view, then, is when he is on the lead end of a cut and he is your eye?

A. That is right.

Q. In other words, when you see him drop off and there are cars ahead of you and you are taking signals from him, if he disappears from your view, then you stop? A. That is right.

Q. And once a man has stepped down off a box-car and has gotten himself off without falling, you have assured yourself that he has [125] safely alighted, so far as your operating of the engine is concerned, it doesn't make any difference whether he disappears from your view or not? A. No.

Q. You are not concerned with what he does?

A. No.

Q. So long as you have other men to take your signals from, is that correct?

A. That is right.

Q. Another rule was read yesterday, Rule 104-C was read to you saying that:

"An Employe, alighting from a moving train to change position of a switch behind such train, must get off rear of rear car when practicable, or, when not practicable, on opposite side of track from switch stand, unless it is unsafe to do so. While a train is moving over a switch, any employe in the vicinity of such switch must take position on opposite side of track from switch stand when prac-

(Testimony of Frank G. Edwards.)

ticable, and, when not practicable to do so, must take position not less than twenty feet from the switch stand."

Now, first, Mr. Edwards, let me ask you, preliminarily, were you engaged in a movement of a train or were you engaged in a switching operation in yard limits?

A. Switching operation in yard limits.

Q. Does that rule have any application in a switching movement [126] in yard limits?

A. That is a main line rule.

Q. So that it didn't apply to this move as you were making it on that day when Mr. Bellamy was hurt, is that true? A. True.

Q. And even if it did, is it not true that that rule would only require a man, so far as the twenty feet is concerned, to remain twenty feet away from the switch stand if he is on that side of the track?

A. That is right.

Q. In fact, the rule is very clear that that is what the rule means; and the purpose of that rule is so that a switchman won't be so close to a switch, to keep him away from the switch so that he won't throw the switch while the rear trucks of a car are still going over the switch and derail it? Isn't that what the purpose of the rule is?

A. That is right.

Q. So much for the rules of the road, then. Now, then, Mr. Edwards, as you were coming out of there

(Testimony of Frank G. Edwards.)

and backing up, that was a backup movement for you? A. Backup movement.

Q. All the controls are on your side of the locomotive? A. That is right.

Q. The throttle and the brakes and everything but the bell? A. You have a bell, too. [127]

Q. You have a bell, too? A. Yes.

Q. When Mr. Bellamy dropped off, had you seen him before he dropped off of the car?

A. Coming out of the plant, I had looked at him before he dropped off.

Q. Did you see him immediately prior to his dropping off?

A. At the time he dropped off, I saw him.

Q. And just before he dropped off, did you see him? A. Yes.

Q. Did you at any time see him as he was moving there and you watched him, did you see him look back in the direction towards the harbor?

A. I had looked in the direction towards Redwood City on the way out. He might have been looking back at the time I was looking in that direction, the direction of the movement of the train.

Mr. Phelps: I am not asking you as to what he might have done. I ask that the answer be stricken. My question was very simple.

Q. So far as your observation was concerned, did you or did you not see him look back?

A. I did not.

The Court: I will allow the answer to remain. It shows the limit of his testimony. [128]

(Testimony of Frank G. Edwards.)

Mr. Phelps: I think that is very true.

The Court: He wasn't looking.

Q. (By Mr. Phelps): You weren't looking all the time? A. Not all the time, no.

Q. But you did see him as he dropped off?

A. Yes.

Q. And immediately before he dropped off, because, obviously, Mr. Edwards, it was also your duty to watch the conductor across the road as well as the other cars behind you and the other men?

A. That is right.

Mr. Phelps: I have no other questions.

Q. (By Mr. Bledsoe): Mr. Edwards, you went immediately to the driver of the automobile, did you not?

A. I went to the side of the truck to get the information off of the registration card on the steering wheel.

Q. And the very first thing the driver said to you was that he was in a hurry to get to the postoffice with the parcels; you didn't say anything to him before that? A. No.

Q. He just blurted that out to you?

A. He said he was in a hurry to get to the postoffice with the mail before the postoffice closed.

Q. Now, you were interviewed by the police after this accident? A. No.

Q. Didn't the police——[129]

A. I saw the police there, and they asked how

(Testimony of Frank G. Edwards.)

it had happened. I guess you would say it would be interviewed.

Q. Didn't you tell them how it happened?

A. I told them that the man stepped off the car and the truck came along and hit him in the back with the rear fender.

Q. As a matter of fact, the man, Mr. Bellamy, was moving at the time he was hit, wasn't he?

A. He was moving towards the center of the road.

Q. And he was backing up, wasn't he?

A. He was sort of sidestepping toward the center of the road.

Q. Wasn't he moving backward against the flow of traffic? A. More sidestepping.

Q. Wasn't he backing against the current of traffic and backing into the road?

A. No, he was more sidestepping.

Q. You remember being interviewed by someone on behalf of the Southern Pacific about the accident on April 5, 1949, about noon time, the day after the accident, a Mr. Horgan or Hogan or some such name as that witnessed your signing of a statement?

A. Hogan? I don't recall that name.

Q. Let me show you this statement and ask you if this has your signature on it.

A. Oh, yes, yes.

Q. That is your signature? A. Yes. [130]

(Testimony of Frank G. Edwards.)

Q. Would you read it over, please. Read the whole thing starting at the front page.

A. Uh-huh (affirmative).

Q. As a matter of fact, you have seen this statement before, haven't you? A. Yes.

Q. And you were interviewed by someone in Mr. Hepperle's office and shown the statement there? A. Yes.

Q. And you recall now, do you not, the occasion that you gave such a statement? A. Yes.

Q. And this was the day after the accident?

A. Yes.

Q. And your memory of the accident was pretty fresh at that time, I assume? A. Yes.

Q. I will ask you if at that time you stated this way:

"Was he standing still at the time he was struck?

"A. No.

"Q. Which way was he moving, or how was he moving?

"A. He was backing against the current of traffic, backing into the road."

Is that correct? A. That is right. [131]

Q. Did he at any time while you watched him look in the direction that the truck approached?

A. No, not after he had alighted from the car.

Q. Can you tell me whether or not the bell was ringing on your engine? A. It was.

Q. How many pounds is that bell, do you know?

A. I think they are about 80 pounds.

(Testimony of Frank G. Edwards.)

Q. Does it make a lot of noise?

A. It does considerable.

Q. You yelled at Mr. Bellamy to look out, didn't you? A. Yes.

Q. You saw the car coming before it even swerved, did you not?

A. Before the driver swerved?

Q. Yes. A. Yes.

Q. And for what distance did you see it coming?

A. Oh, about 70 feet.

Q. That is the entire distance you saw it coming before the accident happened?

A. Maybe a hundred feet.

Q. 75 or 100 feet?

A. Somewhere in that neighborhood.

Q. And the right rear fender is what collided with Mr. Bellamy? A. That is right. [132]

Q. I have just one other question. I wasn't clear about the picture, Plaintiff's Exhibit 31. Is Plaintiff's Exhibit 31 supposed to be the position that your engine was in at the time this accident happened? A. Yes.

Mr. Bledsoe: That is all. [132-A]

Recross-Examination

By Mr. Phelps:

Q. But of course the head brakeman is not required to be in your view at all times, is he?

A. There's times when he can not be in the view of the engineer.

(Testimony of Frank G. Edwards.)

Q. Why, of course. And so again, as long as there is one man in view, that is all that is necessary. All right. Now, then, one other thing: the conductor, is he not, is the man in charge of this movement? He is in charge of the train?

Mr. Hepperle: Beg your pardon, your Honor. I think that question is compound. I wish it rephrased as to whether the conductor was in charge of a train or of the movement.

Mr. Phelps: I will rephrase it.

Q. The conductor is in charge of the crew, isn't he?

A. The conductor is in charge of the crew.

Q. That's right. And the conductor, he is giving signals and is in a position to see—he is in charge of a movement, isn't he?

A. The conductor has a tag man working under him that usually does the switching moves.

Q. Yes. But the tag man in this case was Mr. Husson, wasn't he? A. Yes.

Q. And the tag man is the man that carries a switch list? A. That's right.

Q. And so far as the conductor is concerned, and in this move [133] particularly, where he had got cars ahead of the engine in your direction of movement and cars behind your engine in the direction of movement, and where there is nobody out on the point riding out here at the head end of your train in the direction of movement, and where your conductor is the only one that can see the

(Testimony of Frank G. Edwards.)

head end of those cars, your conductor is the man from whom you should take your signals and in charge of the movement, isn't that correct?

A. Any member that is in view that has either end of the train in view is the man I would take the signals from.

Q. You bet your sweet life. You bet. And you would take the signals from the man who was in charge on that particular move, for the safety of everyone—the man that can see the front end of your train as well as the rear end, isn't that true?

A. Yes.

Q. So now, isn't it a fact, then, on this very move, where the conductor was the only man that could see the front end of your train when you were moving——

Mr. Digardi: I object to that, your Honor, because there is no evidence that Mr. Bellamy could not see the front end of the train. He is assuming facts not in evidence.

The Court: Let him finish the question and then I will sustain the objection.

Mr. Phelps: All right. Well, I will still make the question because I think it is proper, and I think the facts will [134] speak for themselves. With deference, if I may.

The Court: You are assuming in your question that the conductor was the only man that could see the other end, the west end of that train.

(Testimony of Frank G. Edwards.)

Mr. Phelps: In the position he was in, yes, your Honor.

The Court: The position he was in. Now, there is no evidence that Bellamy couldn't see it. The witness has just stated that he took signals from either party that could see it.

Mr. Phelps: To take signals from either party that could see it.

The Witness: That's right.

Mr. Phelps: But when a man—well, I will withdraw that and put it this way to you.

Q. When you saw Mr. Lechner station himself across the highway you knew that one of his purposes in stationing himself over there was so he could see both ends of your cut, didn't you?

A. That's right.

Mr. Digardi: One moment. I object to that as calling for the opinion of this witness as to what the conductor had in mind at the time. I don't think this witness knows what was in the conductor's mind at that time. We might get that from the conductor.

The Court: Well, I will allow it. The conductor is here.

Mr. Phelps: You can bring it out from the conductor if you wish. [135]

Q. Now, then, in that position you did know this, though, that across the road he was in a position to see the front end of your cut as well as the rear end of your cut?

(Testimony of Frank G. Edwards.)

A. He could see the complete movement.

Q. That's right. And a man in that position on the outside of your curve like that, where he can see both ends, is the man in charge of the movement, is he not?

A. He is in charge of the whole crew, the whole movement and everything.

Q. And the whole movement, is he not? That particular movement?

A. (Nodding in the affirmative.)

Q. All right. Now, then, one other thing that we haven't gone into. These tracks cross Bayshore Highway west of there? A. Yes.

Q. About how far?

A. 800 to a thousand feet.

Q. Just west of Bayshore Highway the tracks continue down and along Chestnut Street, do they not, in Redwood City?

A. I am not familiar with the name of the street, but they continue toward Redwood City.

Q. But they do continue on a street, on a paved street? A. Street track, yes.

Q. And right in the street itself, aren't they?

A. Yes. [136]

Q. For some considerable distance, the very track you had been on?

A. Probably three quarters of a mile.

Mr. Phelps: I have no other questions.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all, your Honor. [136A]

Mr. Hepperle: We would offer in evidence, your Honor, defendant's Exhibit D, being the statement previously referred to by Mr. Bledsoe, and upon which the witness was cross-examined.

Mr. Bledsoe: We will object to that, because there are certain items in there that are not admissible in evidence, I think Counsel knows that very well, and it is incompetent, irrelevant and immaterial, being used only for impeachment purposes.

The Court: If there is anything in there that reflects upon this impeachment one way or the other, I think it is admissible. Let me see it, would you?

Mr. Hepperle: We offer it, your Honor, solely for the purpose of reading the whole statement.

The Court: While I think that the statement should be admitted there are statements made in it that should be read in connection with the statement that has already been read to the witness, to the jury and to the Court. Admitted.

Mr. Hepperle: With your Honor's permission, I should like to read it to the jury at this time.

(The statement of Frank D. Edwards was marked Defendant's Exhibit No. 41 in evidence.)

The Court: Just a minute. Before you start reading it, the grand jury is coming in here.

Mr. Hepperle: Yes, your Honor. [185]

The Court: They will make a little commotion.

(Pause.)

Mr. Hepperle: Shall I proceed, your Honor?

The Court: Yes.

Mr. Hepperle: (Reading) "Statement of Engineer Frank G. Edwards, taken at the office of Trainmaster, San Francisco, in connection with personal injuries sustained by Brakeman William A. Bellamy at Redwood Junction, April 4, 1949, when he was struck by a truck. Interrogations by Mr. W. L. Stiles, Claims Department. Reported by Mrs. Mary Roberts.

San Francisco, April 4, 1949

12:07 p.m.-12:20 p.m.

By Mrs. Roberts:

Q. Will you state your full name?

A. Frank G. Edwards.

Q. What is your occupation?

A. Locomotive engineer.

Q. How long have you been employed by the Southern Pacific Company?

A. Since October, 1925.

Mr. Stiles: Were you engineer on Engine 2345 on April 4, when Brakeman Bellamy was injured at Redwood Junction? A. I was.

Q. Will you please tell us in your own words all the [186] facts and circumstances in connection with this injury?

A. While backing out of Paraffine Company's spur at Redwood Junction Brakeman William A. Bellamy dropped off end of car next to engine at main line switch on right side of engine, and was struck by pick-up truck license number Com. B. C. 89-82 Cal. '49 operated by J. E. Carlson, 353 Santa Clara Street, Redwood City. Operators license 884197. Truck registered to Pacific Portland Cement Company, 417 Montgomery Street, San Francisco, California. Brakeman Bellamy was standing on Harbor Road alongside main track about ten feet from side of car facing engine with back to current of traffic on road. Truck approaching from cement plant passed other members of crew about one hundred feet from point of accident and on rounding curve driver saw man following engine and tried to steer car to left side of road to avoid striking him. Brakeman was struck by right rear fender of truck and thrown toward train. Truck driver did not attempt *to after* brakeman was hit.

Q. When Brakeman Bellamy dropped off the car how long was he on the ground before he was struck? A. Just a matter of seconds.

Q. What were his actions after dropping off? Did he step into a line of traffic?

A. Ten feet would be center of the road. Towards the [187] center of the road.

Q. Was he standing still at the time he was struck? A. No.

Q. Which way was he moving or how was he moving?

A. He was backing against the current, backing into the road.

Q. Which way was Bellamy looking?

A. In my direction.

Q. Did he at any time while you watched him look in the direction the truck approached?

A. No.

Q. Is it your opinion that this truck was moving at excessive speed?

A. For the condition of everything there, I think he was.

Q. How far was the curve that this truck came around from the point where Bellamy was struck?

A. I could see other members of crew and we had two cars between engine and where they were standing. About two car lengths from point of engine.

Q. It was daylight? A. Yes.

Q. Signals being passed by hand? A. Yes.

Q. Was pavement dry? [188] A. Yes.

Q. Mr. Bellamy didn't trip or stumble before being struck? A. No.

Q. In your opinion Mr. Bellamy did not see the truck that struck him before he was struck?

A. No.

Q. Since he was struck by the rear end of the truck that would give the impression that he was in the clear when the first part of the truck went past him? A. That's right.

Q. Is there any reason that you know of why truck driver should not have been moving as he was in the street at that time?

A. No, he should have been driving slower. When he first saw members of the crew on the curb he should have slowed down."

The Court: I am going to strike that out, ladies and gentlemen, that last statement. I admonish you to disregard it because it is a conclusion of the witness and not what he actually observed—those two statements were what he should have done, and I admonish you to disregard it.

Mr. Hepperle: The next question was "Can you estimate his speed?

A. About 30 miles an hour.

Q. Did he have any conversation with you or in your [189] presence regarding what he was or how he came to strike the brakeman?

A. No, except he said he had driven 35 years and it was the first accident he had. He was quite upset about it.

Q. Were there any other witnesses that you know of other than train crew and truck driver?

A. No.

Q. No other automobiles or persons?

A. No, not at the (repeating) not at the immediate time. If there had been another vehicle coming in the opposite direction he probably would have had a collision.

Q. That would indicate he was over in the wrong lane?

A. Yes, in order to avoid Brakeman Bellamy.

Q. There was no crossing involved?

A. No. It happened directly opposite P. G. & E. Substation of Redwood City, directly opposite the gate to the plant on the south side of the road.

That is all.

12:20 p.m."

Each page is being signed by E. J. Horgan and F. G. Edwards. The statement concludes: "I, F. G. Edwards, have read the foregoing statement of three pages and it is true and correct to the best of my knowledge and belief."

The Court: Gentlemen and ladies and gentlemen of the trial jury: The Grand Jury is now here to report. That may [190] take a few minutes, and it is close to four o'clock, so I think I will recess this trial until 10 o'clock tomorrow. So you may go now. Before you go I wish to tell you to bear in mind the admonition that the Court has heretofore given you.

Mr. Bledsoe: Will your Honor instruct the witnesses that are here to return tomorrow morning too?

The Court: Yes, give them the instructions.

The Clerk: All the witnesses in the case of Bellamy vs. Southern Pacific Company and Portland Cement Company are directed to return to this court room tomorrow morning at 10 a.m. without

further subpoena. You are now excused until tomorrow at 10 a.m. This jury is now excused.

(Thereupon an adjournment was taken to tomorrow, Thursday, November 3, 1949, at 10 o'clock a.m.) [191]

Morning Session

Thursday, November 3, 1949, at 10 A.M.

The Clerk: Case of Bellamy vs. Southern Pacific Company and Others for further trial.

Mr. Hepperle: Ready for plaintiff, your Honor.

Mr. Bledsoe: Ready.

Mr. Phelps: Ready for the defendant.

The Court: I neglected to ask you gentlemen to stipulate that the Jury is present.

Mr. Hepperle: It is stipulated.

The Court: I assume you will stipulate that they have been present during all of this trial?

Mr. Phelps: Yes, your Honor.

Mr. Bledsoe: Yes, your Honor.

Mr. Phelps: And if you Honor please, we can enter into a stipulation that *unless of* us calls attention to the absence of one, it may be deemed that we have so stipulated in the future.

Mr. Digardi: So stipulated.

Mr. Bledsoe: We agree.

The Court: Very well.

Mr. Hepperle: At this time, with the Court's permission, I should like to file and serve upon counsel two supplemental memoranda.

Mr. Edwards, will you come forward, please?

(Whereupon the previous witness, Frank G. Edwards, resumed the witness stand.)

The Clerk: Frank G. Edwards, heretofore sworn.

Redirect Examination

By Mr. Hepperle:

Q. You have previously testified, Mr. Edwards, that Mr. Bellamy was giving you a signal immediately prior to the accident?

A. That's right.

Q. Will you tell us what that signal was?

A. It is a back-up signal.

Q. Will you stand and demonstrate how that signal was given?

A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing.

Q. Was that a continuous signal or otherwise?

A. It was a continuous signal.

Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was.

Mr. Phelps: Objected to as immaterial, incompetent and irrelevant and calling for an opinion and conclusion, if your Honor please.

Mr. Hepperle: In respect, your Honor, to the matter of opinion and conclusion, we respectfully submit that the rule of law is that railroad em-

(Testimony of Frank G. Edwards.)

ployees experienced in their occupation are experts, qualified to testify respecting the application of the operating rules of the defendant's particular movements, [193] and that they are likewise qualified as to the custom and practice existing in respect of particular situations. We have several authorities which we will cite if your Honor cares to hear them.

The Court: I don't. I will admit the testimony.

Mr. Hepperle: May we have the reporter repeat the question, your Honor?

(Record read.)

Q. That is, Mr. Bellamy was?

A. That's right.

Q. State whether or not based upon your experience and the rules of the company, it was necessary for Mr. Bellamy to take the position he did immediately prior to the accident.

Mr. Bledsoe: I will object to that, if your Honor please, as calling for an opinion and conclusion as to whether it was necessary. This man is an engine man, and there were a variety of choices available to this man. Maybe this was a proper place and maybe it wasn't. Maybe there were other proper places. But the question of necessity certainly invades the province of the Jury in this particular case.

The Court: I think that is the fact.

Mr. Phelps: We join in the objection.

(Testimony of Frank G. Edwards.)

The Court: I think that that is calling for his conclusion on a matter which the facts introduced will indicate one way or the other; from which the Jury can draw inferences one way [194] or another.

Mr. Hepperle: Very well, your Honor.

Q. (By Mr. Hepperle): Will you state whether or not, Mr. Edwards, the position taken by Mr. Bellamy immediately prior to the accident was a proper one?

Mr. Phelps: Well, that is subject to the same objection, if your Honor please; I think that is for the Jury to determine under the circumstances of this case.

Mr. Hepperle: Again, your Honor, we submit that under the authorities it is a matter of expert testimony. This man is an expert railroad man, familiar with the rules, the custom and practice for many, many years.

Mr. Bledsoe: We want to make the objection, too, if the Court please, that it is calling for an opinion and conclusion of the witness on a matter of fact.

Mr. Hepperle: We are willing at this time, your Honor, since we believe this to be an important matter, to cite the authorities, if your Honor cares to hear them.

The Court: I think I will admit the testimony at this time, subject to a motion to strike, with an admonition to the Jury.

(Testimony of Frank G. Edwards.)

Mr. Phelps: Well, if your Honor please, may I enlarge upon the objection as to the form of the question, and ask that it be confined in this way: That it was a proper place, rather than the proper place—having in mind your Honor's other ruling as to whether it was necessary, or was it the proper place. There may have been several proper places, and I would like to make that objection.

The Court: I think that point is well taken.

Mr. Phelps: Thank you.

The Court: There may have been more than one place where he could have gone.

Mr. Hepperle: Yes, your Honor.

The Court: Change that to "a proper place," and I will allow the question.

Q. (By Mr. Hepperle): Mr. Edwards, will you state whether or not, based upon your experience and the rules of the company, the position taken by Mr. Bellamy immediately prior to the accident, while he was giving you this continuous signal, was a proper position? A. It was.

Q. Counsel asked you with reference to the rules, whether under a certain set of circumstances it was your duty to stop the movement if Mr. Bellamy disappeared from your view. Now going back to the situation as it existed immediately prior to the accident, with Mr. Bellamy giving you a continuous back-up signal, what would have been your duty if Mr. Bellamy had disappeared from your view at that time? [196]

* * *

(Testimony of Frank G. Edwards.)

A. Well, with the movement, we had two cars to the rear of the engine and it was necessary for somebody to be in view at all times to see that these cars didn't hit any obstruction on the track behind us while we were backing up.

The Court: Well, that doesn't complete your answer.

Mr. Phelps: I think it does answer your question, just the way it did yesterday.

The Witness: Regarding the signals of the cars behind us——

Mr. Hepperle: May I start at the beginning of the movement, your Honor? I think we can clear the point up.

Q. (By Mr. Hepperle): Now, [199] Mr. Edwards, the movement was out of the Paraffine spur, backing into the main line toward Redwood City, is that correct? A. That's right.

Q. A coupling had been made up here by this shed on the plat, marked Plaintiff's Exhibit 6. After the coupling had been made, you received a back-up signal? A. That's right.

Q. Who did you receive the signal from?

A. Mr. Husson.

Q. Did you receive a further back-up signal from anyone else?

A. It wouldn't be necessary.

Q. That was at the time of the beginning of the movement? A. Yes.

Q. You have also testified that as the engine and

(Testimony of Frank G. Edwards.)

the cars backed out of the switch or backed out of the spur, that Mr. Bellamy dropped off the car and was in the process of giving you a continuous back-up signal? A. That's right.

Mr. Phelps: If your Honor please, I want to object to that and ask that my objection precede the answer, on the ground it is leading and suggestive. Now that isn't exactly what the testimony was, and it was leading and suggestive. I ask the answer go out.

The Court: Well, it has already been testified to, and he hasn't really finished the question. [200]

Mr. Phelps: Well, the question as to the time,—if your Honor please, I think that answer ought to go out.

The Court: All right, I will let that go out and we may proceed with the examination.

Q. (By Mr. Hepperle): At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else?

A. He was the only one that my attention was directly upon.

Mr. Hepperle: Yes. You may examine.

Recross-Examination

By Mr. Phelps:

Q. Well, now Mr. Edwards, when you were hedging with words, saying "directly upon," you know perfectly well, Mr. Edwards, that Mr. Lechner was over here and your duty was to look at both men to receive signals, isn't that true?

(Testimony of Frank G. Edwards.)

A. You usually watch the man that is making the movement, that is closest to you.

Q. But you also were over there watching Mr. Lechner, the conductor, weren't you? You were glancing over there? A. Well——

Q. Indeed, that is one of the reasons you weren't looking at Mr. Bellamy continuously; that is what you testified to yesterday? A. That's right.

Q. That's right. And there is no difference over night, is there? [201] A. No.

Q. Since you have talked to the attorneys representing the plaintiff, is there?

A. The man that is usually closest to us is the man that we observe, to watch signals.

Q. But you are watching both of them?

A. Yes.

Q. And when one man goes out of your view, from whom you are receiving your signals, if there is another man that is still in your view, you don't stop; you look around to see if there is another man that can see the man that went out of view, don't you? A. That's right.

Q. So that in this case, if Mr. Bellamy had gone out of view, you could simply look around to see where Lechner was; you knew he was in a position to see Mr. Bellamy, you would look around to see where he is, if he can see Mr. Bellamy, and if he can't see him, you don't stop, do you, as long as there is somebody in view?

(Testimony of Frank G. Edwards.)

A. As long as there is somebody in view, you don't.

Q. That's right. So that you still don't stop, even though Mr. Bellamy had remained in a safe place back here and hadn't gone out and given you a signal, isn't that true? A. Uh-huh.

Q. What is the answer? [202]

A. That's right.

Q. That's right. All right. And as a matter of fact, Mr. Edwards, so far as this position is concerned of Mr. Bellamy, it was his own choice, wasn't it, whether he——

Mr. Digardi: I object to that, if your Honor please.

Mr. Phelps: Well, now, you have gone into this. Let me at least get my question out.

The Court: Let him finish his question.

Mr. Phelps: Mr. Edwards, it was his own choice as to whether or not he should stay where he was or whether he should look around and pass any signals to Mr. Lechner across the road, wasn't it?

A. The man following the engine is usually supposed to keep in sight of the engine during the movement.

Q. But it is his own choice, is it not, to see whether he wants to stay there—you wouldn't have stopped?

A. No, I wouldn't have stopped.

Q. That's right. And it is his own choice as to whether he stayed there or whether he should

(Testimony of Frank G. Edwards.)

look around to see whether there was anyone in sight of the engineer and pass signals to him, isn't that true?

Mr. Hepperle: I object, your Honor. That question has been asked and answered. The witness has stated it was the duty of the man to be out there.

The Court: Well; this is cross-examination. It is proper. [203]

Mr. Phelps: And I believe the witness could answer the question. Mr. Reporter, did you get the answer?

(Record read.)

Q. (By Mr. Phelps): That is true, is it not?

A. The man following the engine usually tries to keep in sight of the engineer at all times.

Q. But it is his own choice in the way he wants to do the work, regardless of what the condition is. If he wants to look around and see if there is another man in sight of the engineer that he can pass signals to, then he would look around to see if there was one and pass his signals to that man. Now wouldn't he do that?

A. The men are allowed to pass signals between each other.

Q. And you know perfectly well that is true, Mr. Edwards, isn't that so?

A. That is why they have more than one or two men on a crew.

(Testimony of Frank G. Edwards.)

Q. That's right. So that it was his own choice as to how he wanted to perform his work on that day. You didn't direct him to go out there, did you? A. No.

Q. And it was a matter for him to decide, wasn't it? A. That's right.

Q. That's right. All right. Well, I suppose you have been talking to the attorneys for the plaintiff over——

Mr. Digardi: I object to that remark, your Honor. [204]

Mr. Phelps: Oh, well, I will withdraw it. Forget it.

The Court: I will ask the Jury to disregard it.

Q. (By Mr. Phelps): Now, then, Mr. Edwards, then so far as the—withdraw that.

I think we have covered that point sufficiently, and there is only one other question I want to go into with you.

There was a picture introduced in evidence yesterday. Now, Mr. Edwards, this is Plaintiff's Exhibit No. 31 which I show you, which shows the locomotive, taken from the side of the locomotive, and you have testified to that picture yesterday?

A. Yes.

Q. As to what it shows. Now, Mr. Edwards, I want you to look at that picture again and tell me whether that is the location of the engine at the time you stopped, or whether it is the location of the engine at the time Mr. Bellamy got off the train.

(Testimony of Frank G. Edwards.)

A. That is just approximately where we were standing when we stopped.

Q. When you stopped? A. Yes.

Q. But not at the time when Mr. Bellamy got off? A. No.

Q. So that he got off a little previous to that. So that if there was any testimony to the contrary to the testimony yesterday, you would be mistaken, if you answered the question in the [205] affirmative that way? I call your attention to that, Mr. Edwards, because I believe, if my notes are correct, that on cross-examination by Mr. Bledsoe you indicated that this was the approximate position of the locomotive at the time that Mr. Bellamy got off, whereas it is my understanding that this is taken with the front end way up to the switch points?

A. We didn't move, the engine was moved a very short distance when he alighted, a very, very short distance he alighted and the time we stopped.

Q. But this would be the position, at a standstill, after the accident?

A. Just about that.

Mr. Phelps: That is all.

Recross-Examination

By Mr. Bledsoe:

Q. Mr. Edwards, when you say it moved a very short distance, how many feet do you estimate?

A. Not more than 15 or 20.

Q. And about how many steps did you see Mr.

(Testimony of Frank G. Edwards.)

Bellamy take, side-stepping or backwards, whichever it was?

A. Well, he moved about 8 feet from the car towards the center of the road, at an angle. Facing me with his back to the traffic.

Q. Now after you stopped your train, did you move it any more before the police officers arrived?

A. No. [206]

Q. In your conversation with Mr. Carlson, the driver of the car, did you go over to him and pat him on the back and state to him, not to worry, that it was not his fault? A. No.

Q. The train crew that was east of you consisted of Quinlan, Husson, Bellamy and Lechner, is that right? A. That's right.

Q. You regard the conductor as a member of the crew? A. Yes.

Q. And was Husson at any time in your view after he gave you the back-up signal?

A. Not when we got around the curve. When we entered the curve he wasn't.

Q. Well, by the time you saw Bellamy step off the train, was Husson in your view at that time?

A. No.

Q. By the time you saw Mr. Carlson's automobile coming, was Husson in view? A. No.

Q. Bellamy was in your view all the time?

A. Yes.

Q. And while Bellamy was in your view riding on the box car, was he giving you any signals then?

(Testimony of Frank G. Edwards.)

A. Not on the car.

Q. Was anyone giving you any signals while Bellamy was on the [207] car? A. No.

Q. Now in backing up from this shed, I see on Plaintiff's Exhibit 7 some kind of a crossing on your train there. A. Uh-huh.

Q. Did your engine go in east far enough to go beyond that crossing of the track?

A. We probably stopped right on the crossing.

Q. Now are there any crossings that cross the track to the west of the switch point?

A. Quite a ways back there is a crossing.

Q. How far?

A. Oh, probably 6 or 8 hundred feet, 6 or 8 hundred feet.

Q. That is the Bay Shore Highway?

A. No, there is one before that that goes into some industry there to the north side of the road.

Q. You were not intending to back that far in this move, were you? A. No.

Q. Now in your statement that was read here yesterday, you mentioned that the truck approaching from the cement plant passed other members of the crew about 100 feet from the point of the accident. Are you referring to Lechner and Quinlan in that statement?

A. Lechner was on the opposite side of the road. The truck [208] must have passed him and Quinlan. The last time I saw Quinlan, he was on the ground alongside of the cars when we pulled out of the siding.

(Testimony of Frank G. Edwards.)

Q. Well, when you refer to the truck passing other members of the crew 100 feet from the point of the accident, you stated in the plural, and I am just wondering if you are meaning Quinlan as well as Lechner.

A. If Quinlan hadn't moved from where I saw him, the truck would have passed him.

Q. You were also asked in this statement how far was the curve that this truck came around from the point where Bellamy was struck, and you answered, "I could see other members of the crew, and we had two cars between the engine and where they were standing, about two car lengths from the point of the engine." Now you are referring there, are you, to Quinlan?

A. I am referring to the conductor at that particular time.

Q. Well, you were talking in the plural?

A. I couldn't see Quinlan.

Q. About "other members of the crew." Now doesn't that refresh your recollection, Mr. Edwards, that you did see Quinlan?

A. No, I didn't see Quinlan, because the curve was too sharp for me to see beyond the edge of the car, as the photographs would show.

Q. You are assuming by that, that Quinlan was on the cars, [209] are you?

A. I don't know where Mr. Quinlan was.

Q. Is Mr. Quinlan here in Court?

A. He is.

(Testimony of Frank G. Edwards.)

Q. And is Mr. Lechner here in Court?

A. Yes, he is.

Q. And Mr. Husson? A. He is.

Q. You were having no difficulty in seeing the conductor where he was standing?

A. As long as there was no traffic moving between the conductor and the cab, I could see him.

Q. You were up pretty high in the air?

A. The cab is ten feet and a half from the ground.

Q. And the movement that you were making there that evening, were you in any hurry to get it made and get it over with? A. None at all.

Q. Had plenty of time?

A. Plenty of time.

Q. Now there is one other thing. You illustrated a back-up signal that Bellamy was giving. Would you illustrate that again for me?

A. Well, the man is facing the engineer, he moves his arms from this position. That moves—that means to move away from where he was standing (indicating). [210]

Q. I see. Now if he has his back to you, how would he indicate to you to move still backing up?

A. With his back—you mean?

Q. Yes.

A. You will be the engineer and I will be the brakeman?

Q. Yes.

A. He would go like this here (indicating).

(Testimony of Frank G. Edwards.)

Q. I see.

A. "Back away from me."

Mr. Bledsoe: That is all. Thank you.

Further Redirect Examination

By Mr. Hepperle:

Q. Mr. Phelps examined you and asked you whether it was Mr. Bellamy's choice to be where he was immediately prior to the accident. State whether or not it was his duty to be there.

Mr. Phelps: I will object to that as calling for his opinion and conclusion. It has been answered as to his choice.

Mr. Bledsoe: I will join in that objection.

Mr. Phelps: We are getting into that same thing, if your Honor please, that they are trying to bring out whether it was necessary. And that is for the Jury to decide, all this evidence.

Mr. Hepperle: Mr. Phelps has gone into the matter fully, your Honor; Mr. Phelps seems to be of the opinion it is all right for him to ask for an opinion and conclusion. We should let the *man is* an expert railroad man and is fully qualified and is entitled under the law to answer the question.

Mr. Phelps: My position, your Honor, so there will be no misunderstanding, is that it is simply this—that he was allowed to ask if it was a proper position. Now if that is one of the places that he could have gone under his duties, I have no objection. My thought is that we can't confine it to be that that is his duty to be only at that particular

(Testimony of Frank G. Edwards.)

place, and I think that my position has been consistent.

The Court: Of course the answer in the affirmative, to the effect that his duty was to be there, would be inconsistent with the witness' statement that he previously made, that he had the choice of being there.

Mr. Hepperle: Well, of course, your Honor, he had a choice to violate the rules.

Mr. Phelps: Well, I don't think that there has been any evidence that he—well, go ahead.

The Court: I will permit the question.

Mr. Bledsoe: Do I understand the question, Counsel, to mean that now you are asking him to interpret whether the man was complying with the rules?

The Court: Yes, he has been asked whether or not under his duty as a switchman at the particular time and under the particular circumstances then existant, it was his duty to be there, to go out in the roadway, where he was, to pass signals. That is as I understand the question. [212]

Mr. Hepperle: Yes, your Honor.

Mr. Bledsoe: Well, we will join in the objection, if your Honor please.

Mr. Phelps: We made the objection that that is the precise thing the Jury is to determine, if your Honor please, in that form. I have no objection if it were modified to meet the objection I have made, that he might be out there under his duties,

(Testimony of Frank G. Edwards.)

or might not. But you are getting in that question by its form, something which if answered in the affirmative, would mean that that would be the only place he could be. And I don't think that that is proper, particularly under the state of this evidence.

The Court: The witness on the witness stand is the engineer of the train, he has been operating trains for a number of years, he knows or should know, what generally would be the position to be taken by his brakeman under similar circumstances. I will let him answer that.

Mr. Hepperle: Do you remember the question, Mr. Witness?

A. Was it Mr. Bellamy's place?

Q. I will rephrase or restate it, if I may. Will you state whether or not in the particular circumstances that day, in the particular movement, it was Mr. Bellamy's duty to be in the position he took immediately prior to the accident?

Mr. Phelps: Well, the same objection, and particularly in the form it is now put, because it would modify the question, if [213] your Honor pleases.

Mr. Bledsoe: We join in the objection.

The Court: Go ahead, answer it.

A. There was nothing unusual in Mr. Bellamy's position.

Q. Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times?

(Testimony of Frank G. Edwards.)

A. The head brakeman tries to keep in view of the engineer at all times.

Mr. Hepperle: That is all.

Further Recross-Examination

By Mr. Phelps:

Q. But of course the head brakeman is not required to be in your view at all times, is he?

A. There's times when he can not be in the view of the engineer.

Q. Why of course. And so again, as long as there is one man in view, that is all that is necessary. All right. Now then, one other thing. The conductor, is he not, is the man in charge of this movement? He is in charge of the train?

Mr. Phelps: Beg your pardon, your Honor. I think that question is compound. I wish it rephrased as to whether the conductor was in charge of the train or of the movement.

Mr. Phelps: I will rephrase it.

Q. The conductor is in charge of the crew, isn't he?

A. The conductor is in charge of the crew.

Q. That's right. And the conductor, he is giving signals in [214] a position to see, he is in charge of the movement, isn't he?

A. The conductor has a tag man working under him that usually does the switching moves.

Q. Yes, but the tag man in this case was Mr. Husson, wasn't he? A. Yes.

(Testimony of Frank G. Edwards.)

Q. And the tag man is the man that carries the switch list? A. That's right.

Q. So far as the conductor is concerned, and in this move particularly, where he had got cars ahead of the engine in your direction of movement and cars behind your engine in the direction of movement, and where there is nobody out on the point riding out here at the head end of your train in the direction of movement, and where your conductor is the only one who can see the head end of those cars, your conductor is the man from whom you should take your signals and in charge of that movement, isn't that correct?

A. Any member that is in view that has either end of the train in view is the man who I would take the signal from.

Q. You bet your sweet life. You bet. And you would take the signals from a man you were in charge of on that particular move, for the safety of everyone, and that is the man that can see the front end of your train as well as the rear end, isn't that true? A. Yes.

Q. So now isn't it a fact, then, on this very move where the [215] conductor was the only man that could see the front end of your train when you were moving——

Mr. Digardi: I object to that, your Honor, because there is no evidence that Mr. Bellamy could not see the front end of the train. He is assuming facts not in evidence.

(Testimony of Frank G. Edwards.)

The Court: Let him finish the question and then I will sustain the objection.

Mr. Phelps: All right, well, I will still make the question, because I think it is proper and I think the facts will speak for themselves. All right, your Honor—with deference if I may.

The Court: You are assuming in your question that the conductor was the only man that could see the other end, the west end of that train.

Mr. Phelps: In the position he was in; yes, your Honor.

The Court: The position he was in. Now there is no evidence that Bellamy couldn't see it. The witness has just stated that he took signals from either party that could see it.

Mr. Phelps: Took signals from either party that could see it.

The Witness: That's right.

Mr. Phelps: But when a man—well, I will withdraw it and put it this way to you.

Q. When you saw Mr. Lechner station himself across the highway, you knew that one of his purposes in stationing himself over there was so that he could [216] see both ends of your cut, didn't you? A. That's right.

Mr. Digardi: One moment please. I object to that as calling for the opinion of this witness as to what the conductor had in mind at the time. I don't think this witness knows what was in the conductor's mind at that time. He might get that from the conductor.

(Testimony of Frank G. Edwards.)

The Court: Well, I will allow it; the conductor is here.

Mr. Phelps: You can bring it out from the conductor if you wish.

Q. (By Mr. Phelps): Now then, in that position you did know this, though, that across the road he was in a position to see the front end of your cut as well as your rear end, of your cut?

A. He could see the complete movement.

Q. That's right. And a man in that position, outside of your curve like that, where he could see both ends of the move, is the man in charge of the movement, is he not?

A. He is in charge of the whole crew, the whole movement, and everything.

Q. And the whole movement, is he not, that particular movement? A. Yes.

Q. All right. Now then, one other thing that we haven't gone into. These tracks cross Bay Shore Highway west of there? A. Yes.

Q. About how far? [217]

A. 800 to a 1000 feet.

Q. Now just west of Bay Shore Highway the tracks continue down and along Chestnut Street, do they not, in Redwood City?

A. I am not familiar with the name of the street, but they continue toward Redwood City.

Q. They do continue on a street, on a paved street? A. Straight track, yes.

(Testimony of Frank G. Edwards.)

Q. And right in the street itself, aren't they?

A. Yes.

Q. For some considerable distance, the very track you had been on?

A. Probably three-quarters of a mile.

Mr. Phelps: I have no further questions.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all, your Honor.

(Witness excused.)

Mr. Hepperle: Mr. Lechner, will you come forward, please?

GEORGE P. LECHNER

called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name, sir?

A. George P. Lechner, L-e-c-h-n-e-r.

Direct Examination

By Mr. Hepperle:

Q. Where do you live, Mr. Lechner?

A. 1228 McAllister Street, San Francisco, California.

Q. And who do you work for? [218]

A. Southern Pacific Company, Coast Division.

Q. And how long have you worked for the Southern Pacific Company?

A. Fourteen years.

Q. And what is your position at the present time? A. Conductor.

Q. When were you promoted to the position of conductor? A. May, 1942.

(Testimony of George P. Lechner.)

Q. And what was your position before that?

A. As freight brakeman.

Q. What has been your experience in the 14 years or so that you have worked with the Southern Pacific, in what type of service?

A. Well, practically all of it has been as a brakeman and conductor in local freight service. Generally in freight service.

Q. Directing your attention to April 4, 1949, were you the conductor in charge of a crew on that day? A. Yes.

Q. And who were the members of your crew?

A. Engineer Edwards, Brakeman Quinlan, Bellamy and Husson. I can't remember the fireman's name right now.

Q. And at about 5:30 p.m. on that day, where were you working?

A. We were working on the plant, the old plant spur, and—well, it is the Pabco Company. They have both spurs now. There was a new spur above the one here, and we were working at the [219] old plant spur. That is where the asbestos siding is, where the asbestos is made by the Pabco Products Company.

Q. Was there a movement to be made out of the spur running into the Paraffine plant, or the asbestos plant?

A. Well, yes; I don't think the move has been clearly explained to the Court yet, that we were involved in on that day.

(Testimony of George P. Lechner.)

Q. Well, you tell us what the move was.

A. Well, when we left Redwood City, I have to go back at that, we had approximately 20 cars on the train and the information for the switch movements of all these industrial spurs between Redwood City and Redwood Harbor are furnished us at Redwood City. That is, we are given a switch list of the work to be done, and according to the list this day, we had two cars listed for the Pabco Products Company and two cars for the old plant spur. And as we arrived at Bay Shore Highway, I instructed the brakemen to leave the train back of the highway crossing, because of the number of cars we had, and cut off the two cars next to the engine. And we had one car ahead of the engine. Because the information that we were furnished, the car ahead of the engine was to go into the old plant spur and the two cars behind the engine were to go down the Pabco Products spur. And after we arrived at this point, we went up the main line, because the information, according to the list, was that the car that was spotted first out at this shed on the plant spur was to be a load. That load was to be pulled out and an empty spotted in [220] its place, which we had ahead of our engine. So we went up the main line and stopped, because when we arrived there, I could see that they still had the skids in the car. That is, it didn't look that it was loaded. So I dropped off and went over and talked to the foreman at the shed. Mr. Husson was with me. When I got there,

(Testimony of George P. Lechner.)

he said, no, they hadn't made the load yet, it wouldn't be ready until about 5 o'clock. Then he told us that the car that they gave us ahead of the engine was the wrong capacity for the type of load that he wanted to put in it, but the cars we had behind the engine were the right capacity, so that it necessitated us reversing the movement, the cars. So I told Mr. Husson, then, that he had better pull the cars out of the spur and shove them up the Harbor main line and then drop the cars that we had behind us into the spur, and replacing the baby load, or part load, at door one, so as it could be picked off as we came back from the Harbor and the other cars pulled down to spot. So then we went out and they gave a back-up sign to the engineer, Mr. Edwards, and they headed in on the plant spur with Mr. Bellamy riding—who threw the car in on the switch, and rode the car in and made the coupling, and I stepped across the highway where I could see the movement in all directions, as we had cars on both sides of the engine; and I could check the numbers of the car as they were pulled out of the spur. And then when they started out of the spur, was when the accident happened. [221]

Q. Directing your attention to the plat here marked Plaintiff's Exhibit 6, can you come down here and give us approximately your position, that you took, across the highway?

A. Well, you have a picture there, I think it shows very clearly. I could show you where I was

(Testimony of George P. Lechner.)

standing. I would rather tie that up with the map. This picture will show it.

Q. I show you Plaintiff's Exhibits 13, 16 and 39 and ask you if you are able to find the position you took across the highway in the pictures.

A. Well, this picture—there was a pile of refuse across the road, right by that pole there (indicating).

Q. One moment. This is Plaintiff's Exhibit No. 39. You have pointed to a pile of refuse.

A. I was standing right on that pile of refuse by this pole. That is a driveway right here, too. This is the driveway (indicating). It is right about opposite the end of the shed, and this little crossing here, the first crossing inside.

Q. I will mark that with an arrow.

Mr. Hepperle: I will mark an arrow, if I may, your Honor, on Plaintiff's Exhibit 39, indicating the position Conductor Lechner was standing in across the road (marking). I will mark that "Conductor Lechner" if I may.

A. (Continuing): Yes, this is the same one. You can just see the corner of it there (indicating).

Mr. Hepperle: I will do likewise in respect to Plaintiff's [222] Exhibit No. 16 (marking).

Q. In respect to Plaintiff's Exhibit No. 13, can you also see the position you took in that photograph?

A. Well, this is taken quite a ways back. I would say it was there (indicating). No, that is—Well,

(Testimony of George P. Lechner.)

that looks like this same pole here, though, doesn't it. Well, it was right in that vicinity, because it is taken from a different view, this picture.

Q. You are unable to state positively in respect to Plaintiff's Exhibit 13?

A. Well, on this particular one I am, because it shows—well, I would say it was right about there (indicating). That is as close as I can place it on this picture, the last picture.

Q. Now having seen the photographs, are you able to estimate upon the plat, Plaintiff's Exhibit 6, as to your position across the highway?

A. Which is 6, this one? It was right about the vicinity of this pole, I believe (indicating). It may have been a little bit either way.

Q. Will you point to the approximate position?

A. Was this B-3 a crossing that you put in there?

Q. No, that is another indication.

A. Well, there was a crossing here. You can see in this picture. And I was directly opposite that first crossing.

Q. Will you give your best estimate as to the point on the [223] plat, Plaintiff's Exhibit 6, of your position?

A. Well, I would say about in here (indicating).

Q. (By Mr. Hepperle): With your Honor's permission, I will mark a cross and write "Conductor Lechner" (marking).

(Testimony of George P. Lechner.)

A. (Continuing): I am not very much of a map reader (resuming witness stand).

The Court: It is about 11 o'clock now. I think we will take the morning recess for about 10 minutes. In the meantime, during the recess, ladies and gentlemen, bear in mind the admonition which the Court has heretofore given you.

(Brief recess.)

Q. (By Mr. Hepperle): Had you given any instructions, Mr. Lechner, to the crew as to which side of the train they were to work on or to pass signals on?

Mr. Phelps: Objected to as hearsay, if your Honor please.

The Court: Overruled.

A. Yes.

Q. (By Mr. Hepperle): Which, if any side, had you given them instructions to pass signals upon?

A. Well, when we went to work that day,——

Q. Excuse me. I think we can save a little time. In respect to this particular movement, backing out of the Paraffine spur, had you given any instructions relating to that movement as to which side signals were to be passed upon?

A. Well, I told Mr. Husson, who was the tag man, or list man [224] that day, that whenever practicable, to work on the engineer's side.

Q. Now as I understand it, the engine, with some

(Testimony of George P. Lechner.)

cars, went into the spur to make a coupling, is that correct? A. That's correct.

Q. How many cars did the engine have behind it? A. Well, we should have had two.

Q. And how many cars did the engine have ahead of it as it went into the spur? A. One.

Q. Was the coupling made? A. Yes.

Q. Did the engine and the cars attached start to back out of the spur? A. Yes.

Q. How many cars were attached to the head of the engine at that time?

A. Well, as I recall it, three.

Q. Now at the time that the backup movement out of the spur began, can you tell us where brakeman Husson was?

A. Well, he checked the numbers of the cars.

Q. No, can you just tell us where he was at the time?

A. On the ground, back by the second spot on the shed.

Q. Does that show on this plat marked Plaintiff's Exhibit 6? A. No, it doesn't. [225]

Q. Can you tell us where he would have been in relation to this plant?

A. Well, that number 6 isn't a good picture—it is all right as far as the switch is concerned, but it doesn't show the shed, and the curve is sharper than that.

Q. No, just in relation to Mr. Husson.

(Testimony of George P. Lechner.)

A. Well, he was clear behind the shed, way in the back.

Q. You mean over this way (indicating)?

A. Yes, sir.

Q. Running off the edge of the plat?

A. Yes, sir. There was two spots in that shed, and as the second one wouldn't show——

Mr. Hepperle: I will mark that, if I may, to the east (marking).

Q. Now so that we may have it clearly in mind as to the positions of the various members of the crew, and the backward movement was made, I wish to draw roughly on the board an engine with three boxcars ahead of it and two boxcars behind it (drawing diagram). It is a very roughly drawn diagram. Do you understand it? A. Yes, sir.

Q. As the backup movement began, were you able to see Mr. Quinlan? A. Yes, sir.

Q. Where was he? [226]

A. He was on the brake platform of the third car facing the direction of the engine. That is, on the top of the car, the brake platform.

Q. Are you—will you come down here and indicate his position, please?

A. Well, as I recall him, he was here (indicating). This would be the brake platform.

Q. Will you mark where the brake platform would be?

A. He would be facing the direction of the engine (marking).

(Testimony of George P. Lechner.)

Mr. Hepperle: I will also mark, if I may, your Honor, the direction of movement (indicating).

Q. Now where was Mr. Bellamy?

A. Mr. Bellamy was right here (indicating), on the short ladder next to the pilot, right here, riding on the side of the car.

Q. And the engineer and the fireman?

A. Well, the engineer was on this side of the engine in the cab, the fireman directly opposite him.

Q. As you have already indicated, Mr. Husson would be directly down off the edge of the board?

A. He was back there, clear in behind (indicating).

Q. Now as the backing movement out of the spur began, what, if anything, were you doing?

A. Well, I was across the highway with the copy of my train book. That is, my record book. And the switch list, I had [227] that in my hand, to check the numbers of these cars as they were pulled out of the spur, to be sure that Mr. Husson had come out with the proper car.

Q. How far—how fast was the movement going at that time?

A. Well, the movement had just started. I would say it wasn't over five miles an hour.

Q. As the movement continued, did it ever go over four miles an hour? A. No.

Q. What were the conditions with respect to visibility at that time?

A. Very good. You mean weather conditions, don't you. Or——?

(Testimony of George P. Lechner.)

Q. In respect to visibility, were you able to see?

A. Yes, yes.

Q. Now, directing your attention to a period immediately before the accident, just before the accident took place, where, if anywhere, were you looking?

A. Oh, I was watching Mr. Husson and watching the cars as they came out, more than anything else, because I had to verify these numbers.

Q. Did anything pass your range of vision as you were looking at Mr. Husson and the cars?

A. Well, this pickup truck came between my range of vision and the cars.

Q. Did you estimate its speed? [228]

A. Well, it went through there pretty rapidly. I would say between 30 and 35 miles an hour.

Mr. Phelps: Move to strike his characterization of it other than the statement of miles per hour.

Mr. Hepperle: That may go out, your Honor.

The Court: Yes, "pretty rapidly" may go out. The rest of it may stay in.

Mr. Hepperle: After the truck passed your range of vision, what happened next?

A. Well——

Q. Did you hear anything?

A. I heard a thud and then a squealing of brakes or skidding of tires on the pavement.

Q. What did you then do?

A. Well, I spun around, and this was to my back. I was facing in the opposite direction. And

(Testimony of George P. Lechner.)

I saw Mr. Bellamy sort of reeling around in the highway.

Q. Did you go to him?

A. Yes, immediately.

Q. Did you make arrangements for an ambulance?

A. Well, yes. I found Mr. Bellamy with his arm open and bleeding very badly, and he was apparently suffering from shock. So I directed he be made comfortable and a tourniquet applied, and then I went to call an ambulance.

Q. Who, if anyone, applied the tourniquet? [229]

A. Brakeman Husson told me he was familiar with first aid, so I said, "You go ahead and put a tourniquet on the arm."

Q. Did you see Mr. Bellamy just before the accident happened?

A. Well, I saw him as I pulled out of the spur. He was on the short ladder next to the pilot and the engine.

Q. Was the last time you saw him when he was riding on the short ladder? A. Yes, sir.

Q. Was the bell ringing at the time of the movement? A. I am sure it was, yes, sir.

Q. What kind of a bell sound was it?

A. Well, it is an old type steam engine, and it just had the regular ding-dong bell. It wasn't an electric bell.

Q. Did you hear the evidence of Mr. Bellamy as to where he was immediately before the accident?

(Testimony of George P. Lechner.)

Mr. Bledsoe: Objected to as incompetent, irrelevant and immaterial.

The Court: I think I will sustain that objection.

Q. (By Mr. Hepperle): Will you tell us what Mr. Bellamy's duty was as this movement was being made?

A. Well, Mr. Bellamy was the head brakeman on the crew. His duty was to ride out and dismount from the car and throw the switch for the movement up the harbor main, and his duty is to be in his proper position, as head brakeman, next to the engine. [230]

Q. And what is that position? Can you give us in more detail what it is, what is his proper position? A. Well,——

Mr. Phelps: Well, I'll—never mind, go ahead.

A. (Continuing): When you are switching, in switching movements or any movement, the brakeman is the eyes for the engineer. That is, they have to so distribute themselves so that they can convey signs to the engineer.

Q. On this particular move right here, on this track, with this curve and that situation in mind, what was Mr. Bellamy's duty?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial, calling for an opinion and conclusion, if it is limited to one specific thing—it is "the duty." I mean, if he wants to give all his duties, I have no objection.

The Court: Well, that is the question. What were his duties at that particular time?

(Testimony of George P. Lechner.)

Mr. Phelps: If it is purely that, I have no particular objection. I didn't hear it that way, your Honor.

Q. (By Mr. Hepperle): Will you tell us what his duties were at that particular point in those circumstances? A. Well,——

Q. Did he have any duty beyond that of throwing the switch?

A. Well, I have to—I can answer the question, but I have to refer back to the testimony and it has been objected to. [231] Is that right?

The Court: Well, can't you answer the question and then explain it?

A. Yes, he had other duties.

Q. What were they?

A. Well, if he didn't know where I was located, then his duty was to remain in sight of the engineer.

Mr. Phelps: Well, I will object to that, "if he didn't know," and ask that go out.

Mr. Hepperle: Well, I think it is perfectly proper, your Honor.

The Court: I think I will allow it.

Q. (By Mr. Hepperle): Did he have any duty in respect of watching the end of the cut of cars as the movement was made?

A. Well, yes, sir. He might receive a stop signal at any time.

Mr. Phelps: By the way, just for the record, which end?

The Witness: I am assuming you mean the cut.

(Testimony of George P. Lechner.)

Mr. Phelps: The eastward end, thank you.

Q. (By Mr. Hepperle): Did he have any duty with respect to watching the west end?

A. No, I would say not. It is up to me to protect that as the conductor, if they moved over that crossing.

Q. Assuming Mr. Bellamy did not know where you were, whose duty would it be to watch the west end of the cut?

Mr. Phelps: Object to that as hypothetical and asked [232] and answered. He has already given that.

Mr. Digardi: That particular question has not been asked and answered, and it definitely is hypothetical and this man is an expert witness and the cases hold that he is entitled to an opinion.

The Court: I will allow the question.

A. Let me get this straight now. The west end. You mean the cars that were to the rear of the engine?

Q. That's right, the west end, in this direction (indicating).

A. Assuming that Mr. Bellamy didn't know where I was?

Q. Yes.

A. Well, then, he would have to step out and see if there was anybody on the crossing.

The Court: Well, let me ask you something:

Q. Suppose a child ran out on that track on the west end, 10 or 15 yards from where that car was

(Testimony of George P. Lechner.)

moving, and you were on the road where you were and he was where he was; whose duty would it be to signal the train to stop? A. My duty.

Q. Your duty?

A. I was across the highway where I could see the movement in both directions.

Q. Let's assume that he didn't know where you were. A. Then it would be his duty.

The Court: All right. [233]

Mr. Hepperle: You may cross-examine.

Cross-Examination

By Mr. Phelps:

Q. It is also, Mr. Lechner, of course, the duty of brakemen in a movement like that, as he is riding out, and before he drops off, he has to know while he is still in a position and on that curve, and can't see the head end of his cars—he knows then if that movement is being conducted properly, that the engineer wouldn't have started that movement, couldn't start that movement, unless he knows there is a man in position where he can see the front end of that car, isn't that true?

A. That was a long question.

Q. All right, Mr. Lechner. Here is the point: While Mr. Bellamy is still riding on those cars, and before he has dropped off, you are on a curve, he can't then see the front end of that cut, can he?

A. No, sir.

Q. So that in ordinary railroad custom and practice he must know that if the engineer is doing his

(Testimony of George P. Lechner.)

job, that there is a man in position that can see the front end of that cut, doesn't he?

A. Well, he would have a right to assume so.

Q. Certainly he would assume that, and that would be the ordinary custom and practice, isn't that true? And that man was you, in this case?

A. Yes, sir, I was. [234]

Q. You were in the position to see that?

A. That is why I was over there, so I could see the movement all the way.

Q. And so far as Mr. Bellamy's duties were concerned, as he is riding out on that cut of cars, knowing that there must be somebody in position to see that front end, it is his duty to look and see where that man is, isn't that true, so that he can pass signals to him?

A. You are speaking with reference to myself, now?

Q. Yes.

A. Well, he should know where every member of the crew, everyone should know that.

Q. And it is Mr. Bellamy's duty as a good railroad man to know where you are on that move before he drops off that train?

A. Well, I don't like to say that, because I don't want to say whether he is a good railroad man or not. Now you are trying——

Q. All right. I will withdraw the question and we will put it a different way, then. If you don't want to express an opinion on that, let's put it this

(Testimony of George P. Lechner.)

way, Mr. Lechner: So far as ordinary custom and practice is concerned, on a move like that, with Mr. Bellamy riding on the side of the cars, on the outside of a curve where he can't see the front end of his cut, in other words, he can't see the point, it is his duty to know where the man is that can see the front end of the cut, [235] isn't it?

A. Well, I guess it would be his duty, yes.

Q. Certainly it would be. So that there was no reason in the world for Mr. Bellamy, when he got off that cut, to assume that there wasn't somebody that could see the front end and that the front end wasn't protected?

A. Well, I don't know what he assumed. I can't testify as to that.

Q. All right. But you know what ordinary custom and practice is, and you have already testified to that.

A. I know what I would have done, but I wasn't the man involved.

Q. All right. Now, then, you were, of course, in a position where you could watch both ends of that cut?

A. Yes, sir, and all members of the crew.

Q. And you were performing your duties in that respect?

A. I believe I was, to the best of my ability, yes, sir.

Q. So that you were the man to whom signals could be passed by any of the members of the crew behind, is that true?

(Testimony of George P. Lechner.)

A. Oh, yes, behind.

Q. Yes. Mr. Bellamy, in his position, where he dropped off on the main line tracks, could have passed signals to you if he had wanted to?

A. Yes, sir.

Q. And those would have been relayed in turn to the engineer, would they not? [236]

A. They would, provided the engineer was watching me.

Q. All right. But that is part of his duty, to watch you, when he is taking signals from you, isn't it, as well as the other men, if he can see them?

A. Well, that is true; but, Mr. Phelps, in a movement of this kind, I had designated to Mr. Husson the movement to be made.

Q. I understand that.

A. That makes Mr. Husson, then,—he directs that particular switching movement. I am there in a position where I can give a sign from any member of the crew, but as far as myself directing that particular switching movement is concerned, I was not doing so. Mr. Husson was.

Q. I understand what you are trying to say is that Mr. Husson——

A. He is the tag man.

Q. He is the tag man? A. Yes, sir.

Q. He is the man that goes in there and sees what cars are to be pulled?

A. That's right.

Q. He is the man that, when he is satisfied him-

(Testimony of George P. Lechner.)

self that he has got the right car to pull, he has got to tag, he has compared them?

A. He is, and he and I are the only two that have them.

Q. May I finish? [237] A. Excuse me.

Q. Having satisfied himself that those are the proper cars, he is the man that then gives the signal to go out? A. That's right.

Q. All right. But once that move is under way, in the position you are in, you are the man that is protecting the move, you are the man they should look to to pass signals to?

A. Well, the next man that would give a signal, other than a stop sign, would have been Mr. Bellamy, when he stopped them to throw the switch.

Q. When he stopped them to throw the switch?

A. Yes.

Q. Yes?

A. The only signal I would give——

Mr. Digardi: One moment. Let the witness answer the question.

A. (Continuing): The only signal I would give, Mr. Phelps, would have been a stop sign, had something else occurred, such as a car jumped the track or an automobile going across the crossing. We could have a derailment at any time in a switching operation. That is why I placed myself in a position where I can stop the movement if anything happens.

Q. That's right. But I understand also that be-

(Testimony of George P. Lechner.)

ing in that position, you were also in a position to take a signal from any man out of sight of the engineer? [238] A. That's right, yes, sir.

Q. And you men do that all the time in railroad practice? That's correct, isn't it?

A. Well, it is our duty to be in a position where we can pass signals to each other at any time.

Q. So long as one man is in view of the engineer, that is sufficient, isn't it? A. Yes, sir.

Q. And only one man need be in view of the engineer; that is sufficient, isn't it?

A. He must have one man in view at all times.

Q. All right. Now then, you have placed yourseld down here on the map (indicating).

A. I am not very good at maps and that map is not clear to me, so it might not be exactly right where I was.

Q. You didn't see Mr. Bellamy drop off the cars?

A. No, sir, I had no knowledge he had dropped off until the accident occurred.

Q. So then you don't know what point he dropped off? A. No, I don't, sir.

Q. Whether it was opposite you or not?

A. Well, it must have been after he had passed me, or if he had dropped off in front of me, I would probably have noticed it.

Q. Unless the truck had obscured your vision between. Now when the engine was stopped after the accident, where was the front [239] end of the

(Testimony of George P. Lechner.)

engine, do you remember that? If you do, say so. If you don't, tell me.

A. Well, I would place it approximately on the switch.

Q. The front end was still on the switch with part of it in to the spur?

A. Well, no, I think the engine was practically all out on the harbor main, but the cars were still on the spur.

Q. I see. The cars were still on the spur. Now you have given a number of railroad terms. I think we ought to straighten out those. When you first gave your explanation, I am sure there was some things in there that probably somebody didn't follow. In the first place, you said you intended to make a "drop." What is a "drop" movement?

A. A drop is a running switch. That is, when you have cars behind the engine that you need to get ahead of the engine, and there is only two tracks, you start the cars and the engine goes down one track, the brakeman throws the switch and the cars go over to the other track, and then you back the engine up and pick the cars up. That takes them from the rear of the engine to the head of the engine, so that then you have the cars behind the engine that you want to put on the track. We had two.

Mr. Hepperle: I suggest, your Honor, that this is all immaterial, the drop movement would have nothing to do with this accident. [240]

(Testimony of George P. Lechner.)

The Court: Well, it is explanatory. It can't hurt anybody. I didn't understand it.

The Witness: I am sorry. The terms are thoroughly familiar to us, but I don't realize other people don't know them.

Mr. Phelps: He used it; I wanted to have it understood. The reason I did point it out, and the reason it is material, Mr. Hepperle, is this: that in making a drop movement, as I understand it, you would first have to go down this track so as to spot your cars in the clear quite a little ways.

Q. Is that correct?

A. To leave sufficient room for the engine, yes, sir.

Q. And then when you make your drop movement, your drop movement is by going forward, then you slow down just a little bit to take up the slack, the pinpuller pulls the pin, and then you speed up and the engine keeps on going down this track? A. Yes, sir.

Q. And then your cars—then the switch is thrown and the cars which are then following go into the other track?

A. They roll by you into the spur.

Q. Now, as Mr. Hepperle pointed out, you never got around to that drop movement, so that that wasn't involved in the accident?

A. After the accident we did, but not prior to the accident. [241]

Q. Yes, all right. And you think you had, as

(Testimony of George P. Lechner.)

you were coming out of the spur, three cars, is that right?

A. Well, as near as I can recall now, yes, sir.

Q. That is, ahead of the engine?

A. Yes, sir.

Q. Those were all standard boxcars, were they?

A. No, I believe the two on the spur were automobile or furniture cars. They were larger capacity cars for loading. Boxcars have a smaller capacity.

Q. Well, did they want a larger car—were there larger cars behind your engine that they wanted?

A. Yes, sir, larger capacity cars.

Q. Yes. So that the cars you were pulling out and the car that you went in with, the car that you went in with was the ordinary type car?

A. Yes, sir.

Q. All right. A. Standard boxcar.

Q. And that would be the car that you were coupled on to at the time of the accident. Now so far as the standard cars are concerned, do you know what the width of an ordinary boxcar is? The widths are all standard, at any rate, aren't they?

A. Well, there are some cars that are designated over-width, but all Southern Pacific cars and all Class A railroad cars are standard cars. [242]

Q. All right. And do you know what the average width is?

A. Well, forty foot six inch side measurement, usually, and eight foot nine or nine foot two.

Q. As a matter of fact, isn't the width over the

(Testimony of George P. Lechner.)

side sills now? Do you know what the side sills are on a car?

A. No, I don't know all that. There's various cubic capacity too. I know they are designated on the list.

Q. Well, if you don't know, we can establish it another way. I thought maybe you in your experience as a railroad man would know. I will ask you if this does refresh your recollection, that the width over the side sills——

A. That is exterior width, yes.

Q. That is the exterior width. And at the point where the ladders are. A. Uh-huh.

Q. That is the widest part, is nine feet nine and five-eighths inches, is that right?

A. That is approximately correct. We are more concerned with interior measurements for cubic capacity in spotting cars.

Q. All right. And one other thing. Do you know what the standard gauge is, Mr. Lechner?

A. Four foot eight and a half inches.

Mr. Phelps: That's correct. That's all.

Cross-Examination

By Mr. Bledsoe:

Q. Did you have some switch lists, you [243] say, that you worked with there?

A. They were furnished us at Redwood Junction, yes, sir.

Q. And you would have a record, would you not,

(Testimony of George P. Lechner.)

of how many cars you had in that switching movement in there?

A. I had at the time, but I don't have the list any more, sir.

Q. Well, there is such a record kept, is there?

A. There is a copy on file, should be on file, at Redwood Junction or Redwood City.

Q. And that shows exactly how many boxcars and even the number of boxcars; is that correct?

A. Oh, I wouldn't say that, no, sir, because we had to switch these cars and then it is up to us to furnish the shipper the car that he desires, the same as we would do with the Pacific Portland Cement Company. We might have 15 cars for them, but there's only six that we would spot that day. I mean, they are not furnished by numbers or exact numbers or anything.

Q. Well, wouldn't you keep a record of how many cars you had in your train after you went across on the east side of the Bayshore Highway?

A. No, sir, not on a switching movement. Main line movement, we keep a record of all cars handled in our train.

Q. And that switch list wouldn't show it?

A. The switch list would show approximately; it would show the cars we had at Redwood City for the harbor, and the only other thing it wouldn't show was cars we had picked up en route. [244]

Q. Now did I understand you to say on direct examination that you dropped two cars off west of the Bayshore Highway?

(Testimony of George P. Lechner.)

A. No, we left our train west of the Bayshore.

Q. Left your whole train there?

A. And cut off two cars and came down to this industry spur.

Q. In other words, you took two cars when you went down to the spur?

A. We had three cars, one ahead of the engine and two behind, as I recall it.

Q. This is just from your recollection, is it?

A. That's right, sir; I have no records with me.

Q. Had you been into this plant where you were going to spot the cars before you went down with the three cars, with your engine?

A. No, we first went down the harbor main and stopped opposite the shed, and Mr. Husson and I walked over and conversed with the foreman, because we could see the car wasn't loaded, the skids was still in the first car, which was listed as a load.

The Court: By "skid" you mean the——

The Witness: Loading platform.

The Court: Loading platform. A freight loading platform into the car?

The Witness: Yes, sir.

Q. (By Mr. Bledsoe): You went down this main line here (indicating)? [245]

A. That's right, sir.

Q. To a point opposite the shed. Now how did you get there? Did you go with your train or did you walk?

A. No, no, we went down with the engine and

(Testimony of George P. Lechner.)

the three cars, one ahead of the engine and two behind.

Q. And what did you have the two behind for at that time?

A. They were to go up on the Pabco spur. That is, the new spur.

Q. Where is that located?

A. Just beyond the old plant shed. It is about—it doesn't show in that diagram, but it would be another——

Q. East of here?

A. Yes, sir, about, oh, a quarter of a mile involved there, I guess.

Q. And those two cars had already been selected for that plant, had they, by previous orders of the plant?

A. Well, they were listed to go to that plant, the Pabco plant.

Q. Was there any particular reason why you went down there with those two cars behind your engine at that time?

A. Well, we started—we were going down to work the Pabco spur first, and then I was in the cab of the engine, and I told the engineer to stop. I wanted to see the shed foreman or someone there, because this car obviously wasn't loaded. And I said it might result in a change of switching information. So we stopped and I walked over, and Mr. Husson was with [246] me, and we talked to the foreman, and it was a good thing we stopped because

(Testimony of George P. Lechner.)

then, that is the time he told us that one of the cars turned around—they were different capacity than he thought they were, than what he had ordered.

Q. So then? A. So then we backed up.

Q. You didn't go on to the Pabco plant?

A. No, then we would have had to take—one of the spur cars on the spur was an empty that would have to go out, and then that car, in addition to the one we had ahead of the engine, they were to go *go* down to this old Pabco spur in place of the two we had behind the engine originally, to go down. In other words, there had to be two cars spotted at each shed.

Q. And you were going to take the two that were behind your engine and use them in the spur where you were working? A. In the plant spur.

Q. Plant spur?

A. And one empty that we had, we took out of the plant spur, and the one we had, and the engine, were then to go down and be placed on the Pabco spur.

Q. So then you were going to do all your spotting at the old plant, at the plant spur as you call it, first?

A. Yes. Well, no, but it would be—instead of working Pabco first, then it was necessary for us to work plant spur first in order to get the empty out that had to go down to the [247] other place. Otherwise, we would have had to work both places twice, and that wouldn't have been practical.

(Testimony of George P. Lechner.)

Q. Are you sure that you had those two cars on the back of your engine, or is it just your recollection?

A. Well, it is my recollection now. I wouldn't want to swear that we had them. They might have cut them off and went in with the—they might have cut the cars off and went in with the engine, and then come out and picked the cars up later. Now that I won't swear to, but there was two cars involved and that is the approximate switching problem that was involved with the cars.

Q. Did you have a caboose with you all the time?

A. Yes, but it was down, the caboose was down on the other end.

Q. You had left that west of Bayshore Highway, had you?

A. That is as I recall it now.

Q. Now when you said that Husson was in charge of that movement, backing out of there, he was only in charge of it to the extent of stating which cars were to go out, is that right, and starting the movement backwards?

A. Well, a conductor's duties often require him to be absent himself from the crew. That is, if the foreman of the shed comes out and hollers at me, I can't stay with the crew, I have to go and see what information he wants to give me. So for all practical purposes, it is custom and practice, accepted by the railroad company, for the conductor to designate one [248] member of the crew to direct switch-

(Testimony of George P. Lechner.)

ing operations, under his supervision. That is, if I find a man is doing something in error, then I stop the movement and correct him. But if I give him the information, he receives a copy of the list the same as I do, and we call him, well, in slang terms, the "tag man." He becomes, then, the director of the switching operations, so that if necessary arise, I can absent myself from the crew without stopping the operations of the work.

Q. But that didn't become necessary in this movement, did it?

A. Well, in this movement, I didn't absent myself. However, Mr. Husson was directing this particular switching movement, and he and I had discussed the problem.

Q. Well, he wasn't directing it to the extent that he was watching the train's progress in a westerly direction from the place way down here behind the shed, was he?

A. Well, he was in his proper place, that they were to come out on the main line. Husson was going to step over from the spur onto the main track, Bellamy would have lined the switch and sent the cars down to Mr. Husson, who would then have uncoupled the cars that he didn't need for the spur, and sent the engine back to Mr. Bellamy, who would then have went in the spur with the cars we did want in there.

Q. But from the position where you placed Mr. Husson, he was not in the position where he could

(Testimony of George P. Lechner.)

be watching what was happening at the west end of the train, was he? [249]

A. Well, he knew where I was, I told Mr. Husson I would watch out for the rear end. So his only duty, then, was to give them a backup sign, after he was ready for them to pull the cars out of the spur. Mr. Quinlan walked down the opposite side, and as the field man, was sure that all the boards were removed from the cars and all the workmen were out of the cars. That was his job.

Q. Then he climbed up on top of one of the cars?

A. Then he went up the brake ladder, I guess; he was on the brake platform when I saw him.

Q. Wasn't he on the top of the car next to the end?

A. No, sir, as I recall it, he was on the rear car.

Q. I have here a statement that you gave to the Southern Pacific, a Mr. Hoyt, on September 8, 1949.

A. Well, that statement was taken without my record book in my possession, and I didn't know it was going to be used in a court trial. I was giving it to a claim agent. I didn't even state in there the month that it happened, because I didn't have any record book.

Q. Well, you tried to give it to him as best you could from memory?

A. While I was working. He came up to me on the job and took that statement.

Q. You did the best you could from your memory of it? A. That's right, at that time. [250]

(Testimony of George P. Lechner.)

Q. Now was there anything in your record book that tells you where Quinlan was?

A. Oh, no, I remember that. That is from memory.

Q. Pardon me just a moment. Page 2, I checked those two spots. Would you read that there (handing to witness)?

A. "Quinlan was——"

Q. Don't read it out loud, just read it to yourself. Then I will take care of that later.

A. Oh. (Reading.) Well, that must be what I told this man at that time. It is his writing, not mine.

Q. That is your signature? A. Yes, sir.

Q. All right.

Mr. Bledsoe: Will it be stipulated, counsel, that he did state this at that time, what I am about to read?

Mr. Hepperle: Yes, so stipulated.

Mr. Bledsoe (Reading):

"Quinlan was riding the brakestand of the next to the last car. I think the stand was on the far end of the car from the engine and Husson was riding the last ladder of the last car."

Q. Did you have anything in your record book that you would have needed in this statement that you gave, that would have to do with what Bellamy's duties were? A. Oh, no, no. [251]

Q. Or what you had told Bellamy to do?

A. No, I don't believe so, no.

(Testimony of George P. Lechner.)

Q. Then it is true, is it not, that the only function that Bellamy was to perform was to go over there and throw the switch after the train pulled over the switch west of it?

A. Well now, you are asking the same question as the other fellow did. Bellamy knows his duties. I mean, his duties were to be the head brakeman on the job, and if he didn't know where I was, then his duty was to take such action as to govern the movement of the cars and to throw the switch.

Q. Well, isn't this true, that Mr. Bellamy had no signal to give or pass; he was just to wait until the train cleared the switch and then to line it, to put the two end cars on the harbor main?

A. Well, that is approximately correct, yes.

Q. With reference to the vehicle that was traveling along there and had the accident with Mr. Bellamy, you were not paying any particular attention to it, were you?

A. No, sir, I had to—I had no reason to.

Q. You were more interested in the train and its makeup and what it was doing?

A. And my duties, my work and the work of the men under me.

Q. I see.

Mr. Bledsoe: It is twelve o'clock, your Honor. Shall I stop now? [252]

The Court: You can go on for a minute or two.

Mr. Bledsoe: Well, I think that is about all I have now. I think that's all.

(Testimony of George P. Lechner.)

The Court: Yes. Well,——

Mr. Hepperle: I might be able to finish, your Honor, in just another minute or so.

The Court: Well, all right, but we are going to —I am going to have to leave at 3:30 today, so I was going to ask the jury if it would be all right with them to return here at 1:30. Any objection to returning at 1:30?

(No response.)

The Court: So there may be other questions.

Mr. Hepperle: Yes, your Honor. I think that is correct.

The Court: Other questions of the witness here. So we will now recess until 1:30, and during the recess, ladies and gentlemen, bear in mind the admonition heretofore given.

(Thereupon a recess was taken until 1:30 p.m. this date.) [253]

Afternoon Session

November 3, 1949, at 1:30 o'Clock

GEORGE P. LECHNER

resumed the stand.

Redirect Examination

By Mr. Hepperle:

Q. Mr. Lechner, based on your 14 years' experience as a railroad man, based on the rules of the company, based on the custom and practice,

(Testimony of George P. Lechner.)

under the circumstances and movements involved at the time of the accident, state whether or not you, as head brakeman, would have dropped off the train in the vicinity of the frog and taken a position in the highway where you could see the engineer and the men at the rear of the cut and pass signals?

Mr. Phelps: Objected to as incompetent, irrelevant and immaterial what this man would have done.

Mr. Bledsoe: We will object on the same ground.

Mr. Phelps: The question is,—it has already been asked and answered in proper form and has already been submitted to the jury.

The Court: I will allow the question.

Q. (By Mr. Hepperle): Will you answer the question? A. Well, yes.

Q. State whether or not you would have done so even if you knew the conductor was in the same position you were in.

Mr. Phelps: Same objection, if your Honor, please. You [254] are getting into hypothetical matters.

The Court: Same ruling.

A. Would you read that again, please?

Q. (By Mr. Hepperle): State whether or not you would have done so even if you knew the conductor was in the same position you were in.

A. Well, yes.

Mr. Hepperle: That's all.

(Testimony of George P. Lechner.)

Recross-Examination

By Mr. Phelps:

Q. Mr. Lechner, certainly if you had been the head brakeman and had dropped *of* this car, you would have turned around to look to see whether any automobiles were coming before you got on to the highway, wouldn't you? A. Yes, sir.

Q. You're darned right you would. And whereas you have testified as to what you would have done with respect to dropping off, that was all you have testified to, that you would drop off on the other side of the switch, isn't that right?

Mr. Hepperle: That is a misstatement of the evidence.

Mr. Digardi: It is a misstatement of the evidence, your Honor.

Mr. Phelps: Then I misunderstood the question, because my notes showed only that.

The Court: The witness was only talking from a railroad standpoint, as I understand it. [255]

Mr. Phelps: From a railroad standpoint, and hypothetically.

Q. All right, but having in mind the situation, having in mind that having dropped off the car, and having dropped off between the rails of the main line track, still in a place of safety and not on the highway, before you got out onto the highway, would you or would you not have looked in the direction from which traffic would be coming?

A. I very probably would have looked, sure.

Mr. Phelps: Certainly you would. That is all.

(Testimony of George P. Lechner.)

Recross-Examination

By Mr. Bledsoe:

Q. Assuming this question that Mr. Hepperle gave you, you would not have been giving any signals to the engineer, though, would you?

A. Well, that would depend on the circumstances, Mr. Bledsoe, because Mr. Husson was back in that spur and we come out with the cars, and I was the head brakeman. Now suppose the foreman had come out of the shed and said, "Now wait a moment, I have changed my mind again." Well then, Husson would give a stop sign. Then it would be my duty as head brakeman to pass that stop sign to the engineer, so it would necessitate me getting off the car. Therefore it would be the head brakeman's job, regardless of where I was on the job, to know, to be in a position to give the stop sign, yes, because we might have a derailment or anything happen.

Q. Your train was moving? [256]

A. That's correct.

Q. At the time the man gets off. Now——

A. Well, we get on and off all the time in switching operations.

Q. And you put yourself in that man's position, and when you got off the train, you would have been looking back tward Husson, is that right?

A. Well, you have to swing off a car facing the direction of movement.

Q. And then the first thing after that?

(Testimony of George P. Lechner.)

A. Then after that you would face the man that was directing the work, which in this case was Mr. Husson.

Q. Yes. And you wouldn't be giving a signal like this (indicating), would you? That is, the signal illustrated by the previous witness?

A. Well, I can't say as to that. I don't know for what reason Mr. Bellamy was giving that signal. Now whether he had received it or not, I don't know.

Mr. Bledsoe: That's all.

Recross-Examination
(Resumed)

By Mr. Phelps:

Q. Now, Mr. Lechner, one other thing. When the train was in backup movement, as this train was then in backward, backup movement, and if it was going along slow and easy, and assuming that Mr. Bellamy had received no signals from anybody from the rear end of the cut into the spur, there would be no occasion, then, to give any further backup signal, [257] isn't that right?

A. Well, I don't quite clearly understand what you mean, Mr. Phelps.

Q. All right, I will reframe it. I will put it this way to you: Once that train has started out and is in a backup movement and it is going along steady and easily, once that movement has started and it is progressing, as it was on this particular occasion, the engineer needs no further backup sig-

(Testimony of George P. Lechner.)

nal to keep on going, does he? A. Oh, no.

Q. No. He keeps right on going until he is given a stop signal? A. That's right.

Q. So that the only next signal he would receive would either be a stop signal or an easy signal?

A. Yes.

Q. All right. Now then—and the only men on this crew, on this particular occasion, from which Mr. Bellamy could expect to receive signals, would all be back in the direction toward the harbor, isn't that correct? A. Yes.

Q. Yes. There was nobody——

A. Because everyone of us then, after he come out, we were all, including myself, on that side.

Q. So there was no further occasion for him to look in the [258] direction of the engineer to receive any signals, was there?

A. Well, he wouldn't receive signals from the engineer, anyhow. He would give them to the engineer.

Q. Of course not.

Mr. Phelps: That is all.

The Court: Let me ask you something. Suppose a truck passed between you and the train, one of these great big trucks that may be eight or ten feet high, and the train is backing out there, and the western end is blind, isn't it?

A. Well, no, because I was across the road, your Honor, where I could see the track clear to the

(Testimony of George P. Lechner.)

Bayshore Highway. You see, on that curve there——

Q. Well, I am just saying. Suppose that your observation is obscured by some large truck or something intervening. A. Yes?

Mr. Phelps: Well, if your Honor please, I don't like to do this—it puts me in a difficult position; but I will, for the record, object to your Honor's question as hypothetical. It didn't happen on this occasion, and I don't think there is any occasion——

The Court: Well, I will withdraw the question.

The Witness: Well, I can answer it.

The Court: I will ask you this way. There was nobody on the west end of those two cars that were behind the engine? [259]

A. Nobody, no, sir.

Q. Nobody looking to see whether you ran over a child or cow or anything, except yourself?

A. No. The curve is to the left there, your Honor, and as there was nobody giving any signals on the fireman's side, it would become the fireman's duty to watch that curve as the curve is toward his left.

Q. Oh, I see.

A. And he was very probably doing so in this case. You see, where the blind side of the curve is, that is outside, or is the apex of the curve—if we are working on that side, we have to station a man over there. That is where I was stationed, on across the highway. But on the inside of the curve, the

(Testimony of George P. Lechner.)

fireman has an unobstructed view of everything to the rear on that side, so he would watch that movement.

The Court: Well, that is just what I wanted to find out.

The Witness: Does that answer it all right?

The Court: Yes.

Mr. Phelps: It certainly does.

Mr. Hepperle: That is all.

(Witness excused.)

Mr. Digardi: At this time, your Honor, we would like to offer in evidence the hospital record of the Southern Pacific General Hospital relating to the care and treatment of Mr. William Bellamy.

Mr. Phelps: To which we raise the objection, if your Honor please, that portions of it, of course, are obviously hearsay, portions call for an opinion and conclusion of witnesses who are not here. I have no objection, if your Honor please, to those portions of it which are made in the ordinary course of routine business entries. Portions of them contain conclusions and opinions of doctors, proper foundation hasn't been laid that those opinions and conclusions were made in the ordinary course of business. And if counsel has any particular—however, I want to state this: If counsel has any particular part he is interested in, if he will direct our attention to it, we may be able to get it in by stipulation. But if it is offered as a whole, we can't agree to it.

Mr. Digardi: I think your objection goes to plaintiff's exhibit No. 30 for identification in this record. If that is so, we will withdraw that and make the offer only of plaintiff's exhibit 29. That is a business entry; it is notes showing the care and treatment, not the opinions. I think your whole objection goes to these two letters, is that correct? Those are the opinions of the doctors, at any rate. Maybe we could do it this way: we will offer it in evidence and may it be received subject to a check by Mr. Phelps; if there is any particular part he objects to, he may in the meantime check over the record and make a specific objection to any specific entry in that record. [261]

Mr. Phelps: I have no objection to that procedure, so long as I have an opportunity to examine the plaintiff's exhibit 29 for identification.

The Court: All right.

Mr. Phelps: To make such an objection.

The Court: That will be the order.

Mr. Digardi: Thank you, your Honor. We offer in evidence plaintiff's exhibit 29 in evidence, subject to check by Mr. Phelps.

The Clerk: 29 in evidence.

(Whereupon plaintiff's exhibit No. 29 for identification was received in evidence.)

Mr. Phelps: Or, I assume by Mr. Bledsoe.

Mr. Digardi: And by Mr. Bledsoe. Excuse me, Mr. Bledsoe. With that, plaintiff rests.

The Court: All right.

Mr. Phelps: Then, if your Honor please, we have some matters we would like to take up with your Honor.

The Court: All right, the jury will be excused until the bailiff comes for them. The jury, during the recess, will bear in mind the admonition I have heretofore given you.

(Whereupon the jury retired, and the following occurred outside the presence of the jury.)

Mr. Bledsoe: If the court please, on behalf of the defendant Pacific Portland Cement Company, we move for a [262] judgment of dismissal in favor of that company and against the plaintiff, or a judgment of non-suit, as it is more commonly known in the State Court, on the ground, first, that the plaintiff has not established the jurisdiction of the court to try the issue as between the plaintiff and the defendant Pacific Portland Cement Company, which is a separable controversy, because the evidence indicates that the plaintiff's residence and place of residence has been in the State of California for a period of about six years now and is therefore the same state in which said defendant has residence; the second ground of our motion is based on the ground that the evidence shows without conflict that the plaintiff was himself guilty of contributory negligence as a matter of law, which proximately contributed to the accident and to his injuries.

(Whereupon the matter was argued by counsel for the respective parties.)

The Court: All right, let's hear from the Southern Pacific.

Mr. Phelps: Yes, your Honor. Primarily, if your Honor please, I should like to address myself to three preliminary motions, all motions to strike evidence. First, if your Honor please, on behalf of the Southern Pacific Company I move now to strike from the record the evidence which was read into evidence, the rules of 7(b) and 104(c), on the ground, if your Honor please, that they are completely without foundation in [263] this case. It appears affirmatively——

The Court: Do you mean they are not applicable?

Mr. Phelps: They are not applicable in any way to anything that happened in this case, and they are without foundation, by affirmative evidence.

The Court: Seven and what else?

Mr. Phelps: 7(b) and a portion of that rule which was read—I have no objection to that very first portion of it, if your Honor please, which reads, the first part of rule 7(b): "Signals must be given and acted upon strictly in accordance with the rules."

That was the first sentence. No objection to that. We do not move to strike that portion of it. I move to strike this portion of it, which is the only remaining portion which was read into evidence: "In backing a train or cars or shoving cars ahead of engine, the disappearance from view of trainmen or

lights by which signals are given will be construed as a stop signal."

The Court: Just a moment. Where is that, on page 13?

Mr. Phelps: That is on page 13, the last sentence of the second paragraph.

The Court: Oh, yes.

(Whereupon the motion referred to was discussed by counsel for the Southern Pacific Company.)

Mr. Phelps: Now, then, that is the first motion to strike. [264] The next two matters that I move to strike I can cover very quickly. The first is, if your Honor please, a motion to strike all evidence of the plaintiff's earnings with the defendant Southern Pacific Company, on the ground that they are not a test of any character whatsoever, that they are not any evidence from which any fair inference can be drawn by this jury as to what any prospective loss of earnings will be from this man Bellamy in the future, because he has affirmatively testified that he does not intend to retain his job as a brakeman, but instead, intends to return to Georgia to a job of $1600 a year. So that the only evidence as to future earnings should be that evidence, and the evidence as to his present earnings is not material and it is not admissible. And now, after development on cross-examination, it becomes without foundation and not applicable.

Also, if your Honor please, I move to strike the evidence of the mortality tables, on the ground that

there is no evidence that this man is permanently disabled from doing anything in an earning capacity way.

(Whereupon the matter was discussed by counsel for the Southern Pacific Company.)

Mr. Phelps: Well, I am making my motions to strike, if your Honor please, prior to the motion to dismiss, so that if your Honor rules on these motions, or wants to defer ruling until I make my motion of non-suit, I can suit the court's [265] convenience. I do wish to direct another motion now to the merits of the case; if your Honor wishes to reserve his ruling, or if your Honor wants to rule, I will be guided by your Honor's convenience.

The Court: No, I would rather have you make your entire argument now.

Mr. Phelps: Very well. Then, if your Honor please, on behalf of the defendant Southern Pacific Company, I move for a dismissal or non-suit on the ground that the facts of the law, as shown by the plaintiff, indicate no rights to relief. This motion is joined separately and severally with a motion for directed verdict and rule 50 of the Federal Rules of Civil Procedure, as well as for a dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. Each of these motions are separately and severally made on the following grounds: First, that there is no evidence of any negligence on the part of the defendant Southern Pacific Company which proximately contributed to the happening of

this accident; that that appears as a matter of law; that there is no act or omission on the part of the defendant Southern Pacific Company, negligence or otherwise, which proximately contributed to the accident which this plaintff sustained.

(Whereupon counsel and the court discussed the motion. During the discussion, it was determined to call in the jury and excuse them for the day. Following this a recess was taken, and said discussion continued.)

The Court: . . . so I would suggest that we continue this until Monday, and at that time I will tell you whether or not I will grant the motions, and if so, which ones I will grant.

(Whereupon, following discussion among court and counsel regarding witnesses to be held in readiness for further hearing of the matter, the jury was returned to the box and the following occurred:)

The Court: Ladies and gentlemen, we are going to recess this case until Monday morning at 10:00 o'clock. So you will be permitted to leave here immediately, but upon doing so, while the case is in recess, bear in mind the admonition that I have heretofore given you. You may leave now.

(Whereupon the jurors were excused and left the court room.)

The Court: And the court is adjourned now until tomorrow morning at 10:00 o'clock, and as

far as this case is concerned, until Monday morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Monday morning at 10:00 a.m., November 7, 1949.) [267]

Monday, November 7, 1949, morning session, 10:00 o'clock

The Court: Proceed.

Mr. Phelps: May it please the Court, on behalf of the defendant Southern Pacific Company, may I state to the Court that it is not the intention of the defendant Southern Pacific Company to call any witnesses in this case. The crew members have all been here in attendance and available to either side. I understand that possibly some of them may be called by the defendant Pacific Portland Cement Company.

Your Honor will recall that I deposited with the Court the statements of the crew members, so that they are all available, and so that I did not intend to call any witnesses on the merits with respect to the evidence of the case in its present state. At the proper time we will ask the Court to instruct the jury as to the effect of that.

If your Honor please, there is one matter that I should like to take up. Counsel, can we stipulate to those figures that I furnished as to the width and length of a standard or box car?

Mr. Digardi: I think we can stipulate that the approximate width, not being bound exactly——

Mr. Phelps: That is quite sufficient.

Mr. Digardi: The approximate width of a box car——

Mr. Phelps: Have you got those figures? I gave them to [268] you, then I lost my figures.

Mr. Digardi: We have checked them in the book and found that box cars all vary in measurements as much as five feet, but these figures are approximately nine feet, and the length of a box car——

Mr. Phelps: Of a standard box car?

Mr. Digardi: We found no such thing as a standard box car, but those are the measurements of a box car, and the other box cars vary somewhat, as much as five feet or more in length, or as much as a foot in width, but those are the measurements of a box car.

Mr. Phelps: Then will you follow me while I state this so that I may state it accurately, Mr. Digardi.

At this time, if your Honor please, I understand that it is stipulated that a box car, an average box car, in its length overall, over the end wheels is approximately 40 feet 8⅛ inches; that the length inside of coupler knuckles is approximately 44 feet 10 inches; that the width over the side wheels is approximately 9 feet 9⅝ inches. And all of these measurements as I have given them to you, your Honor, are approximate, as counsel has said, with one exception that I should like to not be misunderstood, and that is with respect to the width. My understanding is as far as the width of a box car, they are standard unless it is a car marked "extra

wide" and the testimony in this case is that none were so marked. I would like to add that qualification. [269]

Now then, how about the figures on the engine involved?

Mr. Digardi: On counsel's representation that those are the exact measurements of the particular engine, we will accept those and stipulate as to the exact measurements as he has set forth on that particular engine.

The Court: Do you accept the statement as to the average length and width of the box car?

Mr. Digardi: We will accept that as the average. I can't go so far as to say that that width would be exact except as to those marked "extra wide," your Honor. I think we can still stipulate that those are the average width of a box car, but they may vary some.

The Court: All right, then it is so stipulated.

Mr. Phelps: Mr. Bledsoe, do you join in the stipulation?

Mr. Bledsoe: I will join in that.

Mr. Phelps: The measurements that we have on Engine 2345 are the measurements, if your Honor please, from the pulling face to the shoving iron 39 feet 11-11/16 inches.

Mr. Digardi: I might explain——

Mr. Phelps: Let me finish the measurements. Then if some explanation is necessary we can give it. The width over the cab is ten feet, and the dis-

tance from the shoving iron to the end of the cab is roughly three feet.

If your Honor please, as I understand, the distance from [270] the pulling face to the shoving iron is the distance from the front end to the back of the engine itself without the tender. The tender would add to that. If counsel wants that, I will be very happy to furnish that figure. Since there was nothing in the direction of the tender, I did not ask for it and it has not been supplied; but if you want it, we will be glad to furnish it.

Mr. Digardi: We will stipulate that those are the measurements of that particular engine.

The Court: All right.

Mr. Bledsoe: We will join in that.

Mr. Phelps: Then, if your Honor please, there was one photograph which was originally furnished counsel which we submitted along with the others and which was not selected to be placed into evidence by you. At this time, if you have no objections, I should like to have that photograph introduced into evidence. It was taken from the side of the box car at the approximate place where Mr. Bellamy got off and looking in the direction from which the truck came.

Mr. Digardi: If your Honor please, we have no objection to the picture going in—I will qualify it, as to what it shows, I think the picture itself is the best evidence as to what it does show. It shows the road in it. I think the jury can place that. As to whether or not that is where Mr. Bellamy got off is a question; but as to the picture itself, we

have [272] no objection to the picture going in evidence.

The Court: All right; it is admitted.

Mr. Phelps: Then with that qualification, we offer the picture as defendant Southern Pacific Company's exhibit next in order.

(Photograph referred to is marked Southern Pacific Exhibit G in evidence.)

Mr. Phelps: With those stipulations, and with that photograph, and relying upon the evidence already introduced and to be introduced, the defendant Southern Pacific Company rests.

Mr. Bledsoe: We will call Officer Whitmore.

EARL WHITMORE

called for defendant Pacific Portland Cement Company; sworn.

The Clerk: Will you state your name sir?

A. Earl Whitmore.

Direct Examination

By Mr. Bledsoe:

Q. Will you state your full name?

A. Earl Whitmore.

Q. Where do you live?

A. 1622 Hampton Avenue, Redwood City.

Q. Are you attached to the Redwood City Police Department? A. Yes, I am.

Q. And were you attached to the Redwood City Police Department in April of this year? [273]

A. Yes, I was.

(Testimony of Earl Whitmore.)

Q. What is your capacity with the police department? A. Police officer.

Q. Were you called or did you respond to the scene of an accident on April 4, 1949 on the Harbor Road? A. Yes, I did.

Q. Did you investigate the accident?

A. Yes.

Q. Did you make a report of the accident?

A. Yes, I did.

Q. Did you bring that report in response to my subpoena? A. Yes, I have it.

Q. May I see it, please. A. Yes.

(The document was handed to Mr. Bledsoe.)

Q. Can you tell us at what time you received the call that there was an accident?

A. At 5:42 p.m.

Q. And where were you when you received that call? A. Chestnut Street, El Camino Real.

Q. How far is that from the scene of the accident? A. Approximately a mile.

Q. How did you receive word of the accident?

A. Two-way radio in the police car.

Q. Were you alone? [274] A. Yes, I was.

Q. Did you go immediately to the scene of the accident. A. Yes.

Q. About how long did it take you to get there?

A. Oh, probably a minute and a half or two minutes.

Q. And when you arrived did you find an injured man there? A. Yes, I did.

(Testimony of Earl Whitmore.)

Q. And did you see an automobile and a train?

A. Yes.

Q. Can you tell us where the man was that was injured when you arrived?

A. He was lying on the roadway with his feet on the cowcatcher of the engine to the right side, the south side of the street.

Q. Did you see an automobile there that was pointed out as being the vehicle involved in the accident? A. Yes.

Q. Where was it located in reference to the highway itself and the center line?

A. Well, that is a two-lane highway and it was just parallel to the center line on the right side of the roadway.

Q. Now, the diagram here on the board, Plaintiff's Exhibit 6, purports to show the highway itself here, and the brown area is the track, with the third track and what we have been referring to as the main line track that keeps closer to the [275] highway, and the top of the map is toward the north and the bottom is toward the south, and as you can see, this is east to the right and west to the left. A switch stand is located at this spot to the north of the track and to the north of the highway. Did you make any diagram of the situation upon your arrival? A. Yes, I did.

Q. Did you in that diagram fix a point of impact between the pedestrian and the automobile involved?

Mr. Digardi: One moment, please. To which

(Testimony of Earl Whitmore.)

question we object on the ground that it calls for the opinion and conclusion of the witness as to the point of impact. We have no objection to the witness testifying as to what he himself observed, but as to the point of impact, that is a question for the jury. And as authority, your Honor, I cite the case of Stuart v. Dotts, a 1949 decision on the District Court of Appeal of California, opinion by Justice Ward. The case is in 201 Pacific (2), 820, where this exact situation came up. A policeman was called by the defendant and was asked the exact question here, to place the point of impact, and there was a decision in that case in favor of the defendant, and on appeal was reversed. And I might add that Mr. Bledsoe was the attorney for the defendant in that case.

Mr. Bledsoe: I don't know whether that adds anything to it or not, your Honor. [276]

The Court: I sustain the objection to that question.

Mr. Bledsoe: Well, your Honor, I am not asking where the point of impact is. The question I am directing to him is, did he attempt to establish the point of impact.

The Court: Well, you may ask him that.

Q. (By Mr. Bledsoe): Did you make that attempt? A. Yes.

The Court: Without stating what it was?

Q. (By Mr. Bledsoe): Now, how long have you investigated accidents? A. Eight years.

(Testimony of Earl Whitmore.)

Q. And during that eight years you have had occasion to look at marks on the pavement and things of that kind in an effort to reconstruct accidents, have you? A. Yes.

Q. When you arrived at the scene of this accident, what did you look for?

A. We looked for—the first thing we did was look for the injured, to see that he was taken care of properly. Then we tried to reconstruct the accident and we looked for skid marks, any debris on the road, anything of that nature.

Q. Did you find any broken glass any place?

A. No.

Q. What, if anything, did you find in the way of debris?

A. Just a pile of dust, dirt. [277]

Q. And that pile of dust was what, in your opinion?

A. Apparently it came from the fender of the vehicle.

Q. Will you tell us where you found that pile of dust with reference to any part of the highway?

A. Well, it was nine feet from the shoulder of the road, towards the middle.

Q. And where was that pile of dust? Can you locate it with reference to the location of the switch, as to whether it was opposite it or east or west of it? A. It was east of the switch.

Q. Have you any measurement of that? How far was it——

(Testimony of Earl Whitmore.)

A. No, I couldn't see the switch, because the engine was in front of the switch, so I didn't even know it was there at the time.

Q. Did you take any measurements from that pile of dust other than the nine-foot measurement over to the shoulder of the road?

A. We took—I took a measurement from the back of the pick-up truck that Mr. Carlson was driving to the pile of dust.

Q. What measurement was that?

A. That was thirty-five feet.

Q. Did you observe any skid marks to the rear of that automobile?

A. There were no skid marks. [278]

Q. Did you make a diagram to show the position of the train and the automobile and the pedestrian?

A. Yes, it is on the section of that report.

Q. I wonder if you could put it on this diagram, officer, and do it if you can in scale. Here is a little ruler that is of the same scale as the diagram so that that might assist you some.

A. This is rather difficult.

Q. Locate it as nearly as you can with reference to the—as I understand it, you are going to locate it with reference to the spur and main line?

A. Yes.

Q. And show us opposite what part of that it was and also how far out in the street the dust was and where the automobile was.

(Testimony of Earl Whitmore.)

(The witness drew on the diagram.)

Q. What does that little dot represent?

A. That little dot is the location of the pile of dust I spoke of on the pavement.

Mr. Bledsoe: May I use that red pencil a minute? We will call that W-1.

A. That represents the pick-up truck.

Q. Now how about the train? Would you draw on there the train and of what cars it consisted and its location?

(The witness drew on the diagram.)

Q. Those cars are supposed to be forty feet long; I don't [279] know whether you are drawing them to scale or not.

A. Let's see; no, I am not quite; they should be longer. There was the tender, the engine and two box cars made up the train.

Mr. Bledsoe: You have drawn that. May I have your pencil again. We will mark that whole train W-2. And I notice you have put it on the main line track rather than on the spur. Did you do that deliberately?

A. Correct. That is where the train was parked.

Q. Now were there any other measurements that you made besides the 9-foot one and the 35-foot one between W-1——

A. Just the width of the highway, which is approximately, I think, twenty-four feet on the diagram, which includes the shoulder of the road.

(Testimony of Earl Whitmore.)

Q. I am going to mark the automobile in the position that you found it when you got there as W-3. I think you can take your seat now.

A. I have one other on here, if you wish me to put it on there. It is Mr. Bellamy's position.

Q. Oh, you might do that.

A. This is supposed to be Mr. Bellamy.

Mr. Bledsoe: That would be W-4. Now, did you look at the automobile to see whether or not there was any damage to it?

A. Yes, I did.

Mr. Bledsoe: Have you seen these pictures?

Mr. Digardi: Yes, we have observed them.

Mr. Bledsoe: One is in evidence, if the Court please, the large picture of the car is in evidence; the smaller one is not.

Q. I will show you a photograph of a fender on an automobile and ask you if that fairly and correctly represents the damage or dent that you observed in the vehicle? A. Yes, it does.

Mr. Bledsoe: We will offer that in evidence, if the Court please.

(The photograph referred to was marked Defendant Pacific Portland Cement Company's Exhibit DD in evidence.)

Q. I will show you plaintiff's exhibit 40 and ask you if that fairly and accurately represents the vehicle that you inspected after the accident?

A. Yes, that is it.

Q. I call your particular attention to the right

(Testimony of Earl Whitmore.)

front fender which seems to be somewhat chewed up. Can you state whether or not that was fresh or old, or just describe what its condition was.

A. That fender in particular—both front fenders were all rusted up on the pick-up, and they were old damage.

Mr. Digardi: If your Honor please, I would like to object to the answer as to whether it was old or new. I do not object to the part that it was what he observed, but as to his opinion [281] as to whether that was old or new damage, I move that that be stricken.

The Court: Oh, I don't think so. I will allow it.

Mr. Bledsoe: May I pass these to the jury, your Honor?

The Court: Yes.

(Photographic exhibits were passed to the jury.)

Q. (By Mr. Bledsoe): Now, officer, at the time of this accident, what was the prima facie speed limit at the place where the accident happened?

A. Fifty-five miles per hour.

Q. Are you familiar with the schedule of how many feet an automobile goes per second at certain speeds, miles per hour?

Mr. Digardi: Which is objected to—reserve the objection, go ahead.

A. Not in my mind; I have a chart that we go by.

Q. Do you have that there?

(Testimony of Earl Whitmore.)

A. Yes, I do.

Q. Could you tell us at 30 miles an hour how many feet a second an automobile travels?

A. Forty-four feet per second.

Q. And at 20 miles an hour?

A. Twenty-nine feet per second.

Q. And at 15 miles per hour?

A. Twenty-two feet per second.

Q. Now are you familiar with the reaction time of a person [282] has to act upon observing something that has made necessary that act?

A. Yes, it takes three-quarters of a second.

Mr. Digardi: Wait a minute. He asked only if he was familiar with the time. We have an objection to the next question.

Q. (By Mr. Bledsoe): Just answer yes or no.

A. Yes.

Q. What is the reaction time of the average person for acting after seeing it is necessary to act?

Mr. Digardi: Which is objected to, your Honor, as calling for an opinion and conclusion of this witness. The reaction time is something that depends entirely upon each individual in each case and is not the subject of expert testimony in any event.

The Court: I think that is correct, Mr. Bledsoe. I will let the jury take into account their own experience. Everybody knows that from the time you see you have to act to the time you act is a difference of time, a lapse of time.

(Testimony of Earl Whitmore.)

Q. (By Mr. Bledsoe): Do you have a schedule of stopping distances for vehicles traveling at a certain speed with a hundred per cent efficiency of stopping? A. Yes.

Q. At thirty miles an hour what is the stopping distance at one hundred per cent efficiency? [283]

Mr. Digardi: Which we object to, your Honor. It depends in this case on the individual car involved, the circumstances of the highway, the circumstances of what it is made of, what the condition is at the time, the condition of the brakes, how they were applied. That is also not the subject of expert testimony, your Honor.

The Court: Well, he is talking about not this case but where everything is a hundred per cent efficient.

Mr. Digardi: If it is stipulated that the condition of the highway, everything, is one hundred per cent efficient, then we have no objection.

Mr. Bledsoe: That is what I am asking for.

The Court: Yes.

Mr. Digardi: But I think the question should be stated to cover highway conditions, brake conditions and the application of the brakes by the driver.

The Court: You can reframe your question.

Mr. Bledsoe: Include those elements, officer, that Mr. Digardi mentioned in your answer. What is the stopping distance for a vehicle at 30 miles an hour? A. 79 feet.

(Testimony of Earl Whitmore.)

Q. And what is it at 20? A. 43 feet.

Q. And what is it at 15?

A. It doesn't—the chart doesn't go that far.

Q. It doesn't go that low. By a hundred per cent efficiency, does that include making skid marks?

A. Well, a hundred per cent is a violent stopping. It would include skid marks.

Q. And if there are no skid marks, is that less than a hundred per cent efficiency of stopping, and by that I mean it isn't making a violent application; is that what you mean? A. Yes.

Q. Did you interview any people there at the scene of the accident after it happened?

A. Yes, the driver of the pick-up truck.

Q. Did you also interview the engineer of the train?

A. No, I didn't take his statement.

Q. And was there another police officer there?

A. Yes, there was.

Q. What was his name? A. Dixon.

Q. Did you record the statement from the driver of the automobile in your report?

A. Yes, I did.

Mr. Bledsoe: If Counsel has no objection I would like to have him give that statement.

Mr. Digardi: We object to any statement made by the driver of the vehicle. There has been no foundation, there is no showing that it was a spontaneous exclamation or whether it [285] was made

(Testimony of Earl Whitmore.)

in response to questions—a mere narrative in response to questions put by the police officer. We make our objection on that ground.

Mr. Bledsoe: Maybe I had better ask a little further. Officer, how soon after you arrived there did you talk to the driver of the car?

A. Immediately.

Q. You got there within a minute and a half of your call? A. That is correct.

Q. And what do you estimate the length of time between the time you received your call and the time the accident happened?

A. Seven minutes.

Mr. Digardi: We object to that. There is no foundation as to whether or not this officer, we mean this witness, knew when the accident happened. Without that foundation, he wouldn't know if it was five minutes; he just knows what he received over the call, but as to the actual happening, there is no foundation through this witness.

The Court: I think that is correct.

Q. (By Mr. Bledsoe): In talking to the driver of the automobile did you ask him questions and have him answer, or did you ask him what happened, and have him tell you and narrate what happened?

A. I asked him to make a statement as to the accident.

Q. And he made a statement, did he? [286]

A. Yes.

(Testimony of Earl Whitmore.)

Q. And who was present when that statement was made?

A. Well, as far as I know, Mr. Carlson and myself, and some of the train crew were standing around, but I couldn't name them.

Q. Again I would ask that you give us what his statement was.

Mr. Digardi: To which we object, it is self-serving, and there is certainly no foundation that this was any spontaneous exclamation. It was made in response to a question by the officer as to what happened.

The Court: Yes, I think I will sustain the objection.

Mr. Bledsoe: I think that is all. You may cross-examine.

Cross-Examination

By Mr. Digardi:

Q. Now, Officer Whitmore, of course you don't know, of your own knowledge, what time the accident happened at all? A. No, sir.

Q. Is that correct? Is that correct?

A. Well——

Q. I mean of your own knowledge; you weren't there at the scene of the accident when it happened?

A. No, the only way I know, it was told to me by one of the train crew.

Q. Of your own knowledge—I am asking you

(Testimony of Earl Whitmore.)

of your own knowledge—you don't know what time the accident happened? A. No.

Q. You weren't there, you didn't observe the happening of the [287] accident? A. No.

Q. All you know is what you observed after you arrived at the scene of the accident?

A. That is correct.

Q. You don't know whether or not, of your own knowledge, the automobile was moved between the time of the happening of the accident or whether it remained in the place where it stopped, is that correct?

A. I didn't see it stop there; I wasn't present when the vehicle stopped.

Q. So you don't know whether or not the automobile may have been moved in one direction or the other from the time the accident happened until you arrived? A. No.

Q. As to the train, you don't know where the train was stopped after it was over; this shows where you observed the train when you arrived there? A. That is correct.

Q. You don't know whether or not the train was moved between the time of the happening of the accident and the time when you arrived there?

A. No.

Q. And the same with Mr. Bellamy; you don't know where he was lying after the accident; it is merely your statement as to [288] where he was when you arrived at the scene of the accident?

(Testimony of Earl Whitmore.)

A. That is where he was when I arrived.

Q. You stated you saw a pile of dust located in the highway, is that correct? A. Yes.

Q. You also stated when you arrived there the automobile was down the highway some 35 feet, is that correct? A. That is correct.

Q. There were no skid marks leading from the pile of dirt to the place where the car was?

A. There were no skid marks.

Q. So you wouldn't have reason by way of skid marks to be able to trace it back to the particular spot where this pile of dirt that you testified to was located, is that correct?

A. Yes, I could trace it to the pile of dirt.

Q. There were no skid marks running from the pile of dirt to where the automobile was?

A. No skid marks.

Q. When you arrived there you didn't observe any cars to the west of the engine, is that your testimony?

A. There were no cars west of the engine, that is correct.

Q. And only two cars could be east of the engine? A. That is right.

Q. When did you first become aware of the fact that you would be called a witness in this case?

A. Wednesday of last week.

Q. And who——

A. Pardon me; Monday of last week.

Q. Who contacted you at that time?

(Testimony of Earl Whitmore.)

A. I don't know the party's name; he said he was subpoenaing me—serving me with a subpoena at that time.

Q. Did he talk to you at that time——

A. No, sir, he did not.

Q. Concerning what you knew about the facts of this accident? A. He did not.

Q. Have you talked to anyone representing either of the defendants concerning the facts of this accident?

A. I have talked to no one until I came here in court Wednesday, the first day.

Q. At that time who did you talk to?

A. I talked to Mr. Bledsoe.

Q. Calling your attention to the date of the accident and the date of your report that you have referred to, did you talk to anyone at that time concerning the facts of this accident, anyone representing either of the defendants? A. No.

Q. In other words, your testimony is that this accident happened in April of 1949, and from that date you haven't talked to anyone representing any one of the parties here in court?

A. That is correct. [290]

Q. Until the time you were subpoened to appear here last Monday, is that correct?

A. That is correct.

Q. Now, in the course of your duties, you have been to many accidents; you go every day or when-

(Testimony of Earl Whitmore.)

ever there is an accident, you are called, if you happen to be on duty, is that correct?

A. That is right.

Q. Have you been to a good many accidents since the time of this particular accident, is that correct? A. Yes.

Q. There was nothing about this particular accident in and of itself to keep your mind fresh on the facts that happened in this case, was there?

A. Only by referring to the accident report.

Q. In other words, your testimony here on the stand is not based on your independent recollection, but you have refreshed your memory from the accident report, is that correct?

A. Yes, my accident report.

Q. So you have no independent recollection of what you have observed at that time?

A. No, I can't remember every detail of every accident; it is impossible.

Mr. Digardi: I think that is all.

Mr. Phelps: I have no questions, your Honor.

Redirect Examination

By Mr. Bledsoe:

Q. Officer, what did you determine that pile of dust to be when you observed it there?

A. Well, it appeared to me to be debris from underneath the car which would gather from road dust and dirt that covers underneath the fenders.

Mr. Digardi: We object to that, your Honor, and move to strike his answer as to what it ap-

(Testimony of Earl Whitmore.)

peared to be. Let the jury determine what it was.

The Court: Well, I think the question is what he observed it looked like anyway.

Q. (By Mr. Bledsoe): Is that a phenomenon that you often find after a blow of striking a fender of an automobile? A. Yes.

Q. Now this report that you have here, was that filed right away after the accident?

A. Yes, it was.

Q. And that is available to the public, is it not, after six months?

A. After six months, yes.

Q. Anyone can see it?

A. That is correct; any one concerned with the accident.

Mr. Bledsoe: That is all. Thank you.

Mr. Digardi: That is all, your Honor, and we would like this witness to remain in attendance.

Mr. Bledsoe: Officer Dixon. [292]

DENTON S. DIXON

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: Will you state your name, please?

A. Denton Stanley Dixon.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live?

A. 226 Robles, Redwood City.

(Testimony of Denton S. Dixon.)

Q. Are you on the Redwood City police force?

A. Yes.

Q. What capacity on the police force?

A. Police officer.

Q. How long have you been on the police force?

A. One year.

Q. Were you on any other police force before then? A. No.

Q. Were you on the Redwood City police force in April of 1949? A. Yes, sir.

Q. Did you respond to an accident call on Harbor Road on April 4, 1949?

A. Yes, I did.

Q. Where were you when you heard about the accident?

A. I was on Broadway, downtown.

Q. Were you in an automobile?

A. Yes, sir. [293]

Q. Were you alone? A. Yes.

Q. You weren't with Officer Whitmore?

A. No, one-man car.

Q. Do you know about what time you received the word of the accident?

A. It was at 5:42 over the radio; I heard it when Officer Whitmore did.

Q. You got the same call?

A. Yes, it called two cars to the same accident.

Q. Did you then go there to the scene?

A. Yes.

(Testimony of Denton S. Dixon.)

Q. How long did it take you to get there from where you had been?

A. Approximately two minutes or three minutes, at the most.

Q. This location you were on was Broadway and where?

A. Downtown; it was probably Broadway and Winslow.

Q. In Redwood City?

A. Yes, or vicinity.

Q. And that is about how far in mileage from the place of the accident?

A. Approximately a mile and a half.

Q. Where is the post office located in Redwood City? A. It is on Jefferson.

Q. How far—— [294]

A. Between Broadway and Middlefield.

Q. How far is that from the scene of the accident, approximately? A. A mile.

Q. Can you tell me whether you got to the scene of the accident ahead of Officer Whitmore, behind him, or at the same time?

A. I can't say; I never noticed his car.

Q. Did you observe whether he was there when you got there? A. No.

Q. Did you observe an injured man when you arrived there? A. Yes, sir.

Q. Where was he when you saw him?

A. He was laying on the north side of the road with his feet up on the cowcatcher of the engine.

(Testimony of Denton S. Dixon.)

Q. Did you observe an automobile that was pointed out as being involved in the accident when you got there? A. Yes.

Q. Was it still in the highway?

A. Yes, it was.

Q. Officer Whitmore has put up here a diagram and W-3 as being the place where he observed the automobile. Would your idea of it be any different, and if so, would you mind putting it down on the diagram?

A. No. I went to the injured party immediately upon arrival; I went over to the sub-station driveway, parked my car, walked right straight across to the injured man to see if there was [295] anything I could do, if he was bleeding, to stop his blood, or do something until the ambulance got there.

Q. In other words, you and Officer Whitmore sort of divided up your duties there, did you?

A. Yes. Well, the first one that arrives, he goes to the bad part of the accident, and if I arrived first before Officer Whitmore I went to the injured party. Maybe he had been there before; I don't know.

Q. Did you busy yourself at all with reference to measuring anything or assisting Officer Whitmore in that respect?

A. Only from the point of impact to the injured party.

(Testimony of Denton S. Dixon.)

Q. Did you observe the train that was located there? A. Yes.

Q. From your observation of the train, was it on the spur track or was it on the main line track?

A. It was on the main line.

Q. Did you talk to any of the people there at the scene of the accident about whether they had witnessed it?

A. I talked to some of the train crew; they identified theirselves but wouldn't make any statement, except the engineer.

Q. The engineer was the only one that would make a statement? A. Yes.

Q. Did you talk to the driver of the car at all?

A. No, I did not.

Q. Did you observe a spot of dust on the pavement? [296]

A. Yes, that is where I took my measurements, from the debris to where the injured party was laying.

Q. You didn't measure from that spot to where the automobile was? A. No.

Mr. Bledsoe: I think that is all. You may cross-examine.

The Court: We will take a recess at this time for ten minutes. During the recess, ladies and gentlemen, bear in mind the admonition the court has heretofore given you.

(Recess.)

(Testimony of Denton S. Dixon.)

Cross-Examination

By Mr. Digardi:

Q. Mr. Dixon, you don't know of your own knowledge when this accident happened, do you?

A. No.

Q. You weren't there and didn't see the accident happen; you only know you received a call and you proceeded immediately to the scene of the accident upon receiving that call? A. Yes.

Q. You don't know whether or not the automobile was moved or stationary, whether it was at the point it stopped? A. No.

Q. You don't know whether the trains were moved after the accident and before the time you arrived? A. No.

Q. You state there were no skidmarks; you observed no skidmarks [297] on the highway, is that correct? A. That is correct.

Q. Did you look for skidmarks? A. Yes.

Q. But you didn't observe any. Did you observe whether or not there were cars to the east of the engine? A. Yes, I did.

Q. Now do you know of your own knowledge whether there were such cars, or are you just taking it because the diagram on the board shows that there were no cars?

A. No, there were no cars to the rear of the engine.

Q. You remember that clearly of your own knowledge? A. Yes.

(Testimony of Denton S. Dixon.)

Q. And you further stated that you did talk to various members of the crew, is that correct?

A. Yes, I did. The engineer gave a statement.

Q. And the others stated to you that they did not see the impact, is that correct?

A. That is right.

Q. They identified themselves as members of the crew but stated that they did not see the accident?

A. That is right.

Q. Is that correct? And Mr. Quinlan told you that, is that correct?

A. No, Mr. Quinlan said he was at the rear of the train. [298]

Q. And didn't he state to you he didn't see the impact?

A. No, Mr. Edwards said that he seen the impact.

Q. And Mr. Quinlan stated to you he did not see the impact? A. That is right.

Q. That is correct? A. Yes.

Mr. Digardi: I think that is all.

The Court: That is all.

Mr. Bledsoe: Thank you, Officer.

Do you want him to stay, too? Do you still want both officers?

Mr. Digardi: No; I think, your Honor, both officers may be excused.

The Court: All right.

Mr. Bledsoe: Call Mr. Quinlan.

JOSEPH QUINLAN

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: Will you state your name, sir?

A. Joseph Quinlan.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live, Mr. Quinlan?

A. 388 West San Fernando, San Jose.

Q. Are you presently employed by the Southern Pacific? [299] A. I am.

Q. And were you employed by the Southern Pacific on April 4, 1949? A. I was.

Q. Now were you a member of the train crew in which Mr. Bellamy was working at the time he was injured on that date? A. Yes, sir.

Q. What was your job on the train?

A. I was what is known as the field man or the rear end brakeman.

Q. Since the happening of that accident, you gave a statement, did you, to the Southern Pacific about the accident? A. I did.

Q. I will show you defendant Southern Pacific for identification exhibit No. C and ask you to look at that and see if that is the statement?

A. Yes, sir, this is correct; this is the one. It has my notations on it.

Q. You have just heard Officer Dixon state that you advised him after the accident that you didn't see it?

(Testimony of Joseph Quinlan.)

A. I would say that Officer Dixon is mistaken in not knowing one member from another. I certainly wouldn't make a statement like that in view of the fact of the position I was on that train.

Q. Did you mention you didn't see the accident?

A. It has been brought out in this court as to where I was, and according to the rules, and actually where I was, on the standard box car 15 feet above the top of the rail—that means that when I was standing at that brake platform my torso was above the roof of the car, which would have made me roughly somewhere between 17 and 18 feet above the top of the rail, and in an advantageous position to see in all directions.

Q. Then you were in a position to see the accident? A. I was.

Q. And your position was where, Mr. Quinlan?

A. I was on the car next to the engine at the top of the long ladder, close to the brake platform.

Q. Then were you in a position where you could see the engineer himself? A. Yes, sir.

Q. Were you in a position where you could see Mr. Bellamy where he was riding on the side of the car? A. I was.

Q. And did you see Mr. Bellamy leave the side of the box car? A. I did.

Q. And when he left the side of the box car what did he do?

A. He left the box car in an approved manner,

(Testimony of Joseph Quinlan.)

his body facing the equipment, and he made one or two steps after he hit the ground, not more.

Q. In which direction? [301]

A. Away from the car.

Q. Toward the center of the highway?

A. Right.

Q. And with his back in which direction?

A. To the highway.

Q. Well, by "to the highway" do you mean his back was north, south, east or west?

A. May I stand up and illustrate?

Q. Yes, surely.

A. When he left the car, he left it like that. (Illustrating.) You pull your foot away, and as you do, your momentum puts your weight on your foot, and a little way out, roughly about two feet, and you go in that direction and you go to the right. When you step off like that you can whirl a little bit and you look both ways. We weren't going over four miles an hour. Now, as I say, the gentleman didn't move very far when he got off.

Q. About how many steps would you say he took? A. Not over two.

Q. And did he take that in a backward movement?

A. In a swinging movement; he wasn't walking backwards.

Q. How about the conductor of the train? Did you see him?

A. He was in a position where he could direct,

(Testimony of Joseph Quinlan.)

where he should be under the rules, over there on a little mound across the road. [302]

Mr. Digardi: I move to strike that out as not responsive to the question, your Honor. He asked where was he, and he made his conclusion as to what the conductor could see. He was not over where the conductor was.

The Witness: I could see the conductor, if you please.

The Court: "According to the rules"—I will let that part of the answer go out.

Mr. Bledsoe: Did you make any sound or outcry to Mr. Bellamy before the accident?

A. Yes, sir, just as that truck went by, it was there, I seen it was going to happen; I could see it before it happened, and I yelled, "J. C., look out!" That stands for an expression I won't use in court. I yelled, "J. C., look out!" And he couldn't hear me, and then the next thing there was a big pile of dust spinning in the road, he turned around three or four times, and staggered, and then fell to the pavement.

Q. Did he step off of the box car on to the highway or on to some other spot?

A. He stepped on to the thing that you have on your diagram there; I don't know just what the distance was, but from the tie ends to the dirt next, there is no real distinction between the track and the road. It is very hard to say just how he stepped, how much is dirt, because the road, it tapers off

(Testimony of Joseph Quinlan.)

from macadam to dirt and it is more or less traveled on right close to the tie ends. [303]

Q. Well, did he step off between any rails?

A. No.

Q. Now the automobile after the collision moved how far, about?

A. Oh, I don't think it moved over 25 or 30 feet, and I wouldn't confine myself to an exact statement.

Q. Now after the automobile stopped was it changed or moved any after the accident?

A. No, sir.

Q. Which way was Mr. Bellamy facing when he stepped off, or can you tell us whether he was facing Redwood City or facing the harbor?

A. He was at an angle. When you step off a train you usually step in the direction of motion, which made him at a 45 degree angle toward Redwood City. That is a physical fact, that you can only leave a train in a certain manner; I will illustrate. As you are on the side of the car like this, you let go, that would be a fool's trick, you would fall on your back. So when you leave go the grab-iron and turn, you must let go like this, which puts your body, as I say, in an angling position.

Q. He was facing the train engine more or less, then?

A. At a trifle; he wasn't at right angles to the train, no.

Q. What part of the truck and the man came together, did you notice?

(Testimony of Joseph Quinlan.)

A. Just behind the door, the fender there, the body. As I [304] remember, this truck had a slight beveled edge on the side of the pickup, and I would say that he rolled on the edge and the fender when he was struck.

Mr. Bledsoe: I think that is all. Thank you.

Cross-Examination

Mr. Hepperle: Would you mark this, Mr. Clerk?

(Photostatic copy of employee's report of accident Form 2611 was marked Plaintiff's Exhibit No. 42 for identification.)

Q. (By Mr. Hepperle): I show you a paper, Mr. Quinlan, and ask you if that is the 2611 accident report you made following the accident, the report you made to the Southern Pacific Company? Do you recognize your signature? A. Right.

Mr. Bledsoe: May I see it, counsel?

(Document presented to Mr. Bledsoe.)

Q. (By Mr. Hepperle): You have previously identified these papers marked defendant's exhibit C as a further report you made for the Southern Pacific Company?

A. Yes, these are papers I made out.

Q. You made that out September 11, 1949?

A. That is right.

Q. And you made this one out April 27, 1949, the 2611? A. Correct.

Mr. Hepperle: We offer in evidence, your

(Testimony of Joseph Quinlan.)

Honor, plaintiff's exhibit No. 42 for identification, the 2611 accident [305] report, and the other report dated September 11, 1949 presently marked defendant's exhibit C.

Mr. Phelps: If your Honor please, there is an objection to only two very small portions of them, which I could direct your Honor's attention to. On one, there is a matter on the 2611 report which would call for hearsay; and the other is an item in the report which is obviously a speculation and conclusion. Except for those two matters which I direct the court's attention to, I have no objection to them.

Mr. Bledsoe: I have no objections, your Honor.

The Court: Excluding those two matters.

Mr. Phelps: As they are read in, I can direct your Honor's attention to them and ask for the court's ruling on those two matters.

The Court: Yes.

Mr. Hepperle: May I have a moment, your Honor, and have counsel point them out to me?

Mr. Phelps: Certainly, certainly.

Q. (By Mr. Hepperle): How fast was the speed of this move before the accident?

A. About four miles an hour.

Q. And how fast was this truck going immediately before the accident?

A. I would say somewhere in the vicinity of 20 miles an hour. I would probably judge on an automobile passing me. [306]

Q. When did you first learn, Mr. Quinlan, that you were going to be a witness?

(Testimony of Joseph Quinlan.)

A. When I was subpoenaed.

Q. When was that?

A. That was, I believe it was Tuesday night.

Q. Who subpoenaed you?

A. I don't know the gentleman's name.

Q. Was it——

Mr. Bledsoe: I sent one out for him, if you want to know.

Q. (By Mr. Hepperle): Was it on behalf of the railroad or the cement company?

A. The cement company.

Q. Where were you when you were subpoenaed?

A. At my residence; sound asleep, as a matter of fact.

Q. You have talked to no one else about being a witness in this case?

A. No, sir; oh, I beg your pardon. Do you mean did I ever talk to counsel before?

Q. Counsel or anyone else?

A. Yes, I was present in Mr. Phelps' office at one time, we made those depositions, I believe, but other than that, no; no other outside individual.

Q. You made some depositions in Mr. Phelps' office?

A. I wouldn't know what you call it, the way we talked together; I don't know whether I said the right word or not. [307] Maybe Mr. Phelps can tell you.

Mr. Phelps: Your Honor, if you wish, he used the word "deposition." Obviously his deposition

(Testimony of Joseph Quinlan.)

has never been taken. He was at my office and I questioned him about the accident and so forth before it was to come to trial the first time. I imagine that is the occasion he has in mind, because that is the only time he was ever in my office.

The Witness: That is what I mean; in other words, I had been before——

Mr. Phelps: That was about ten days ago.

Q. (By Mr. Hepperle): You were called into Mr. Phelps' office about ten days ago with all the other members of the crew, is that correct?

A. That is correct.

Q. You spent all day there, is that correct?

A. That is right.

Q. Have you given any other written statement in addition to the two that we have just identified?

A. None that I know of.

Q. Ever had any conversation with any member or any person representing the cement company until you came here to court?

A. No, sir, that was a surprise.

Q. He didn't know what you were going to say?

A. No, sir.

Mr. Bledsoe: That calls for his conclusion. I read his [308] statement before I had him subpoenaed.

Q. (By Mr. Hepperle): This train crew had the usual number of brakemen? A. Correct.

Q. Each man had some work to do in this move?

A. Yes, sir.

(Testimony of Joseph Quinlan.)

Q. You knew what Mr. Bellamy's duties were?

A. I did.

Q. What are the duties of a head brakeman on a move such as that?

Mr. Phelps: I am going to object to that as not within the scope of cross-examination, if your Honor please, calling for an opinion and conclusion and not a proper part of this case.

The Court: Yes.

Mr. Phelps: Which is the cement company's case and should not be put in at this time.

The Court: I think at this stage of the case that objection is well taken. If it was in the very beginning of the case I wouldn't make any point.

Mr. Hepperle: Yes, your Honor.

The Court: Here is a witness that has not been examined as to the duties of anybody on that train. If you want to make him your own witness in rebuttal, perhaps you can, but this is cross-examination.

Q. (By Mr. Hepperle): And it is your testimony that you were [309] riding the same car that Mr. Bellamy was? A. No, sir.

Q. Didn't you just testify you were riding the car next to the engine on the top of the long ladder that went to the brake platform?

A. I did, yes. Mr. Bellamy was at the opposite end, if you please, because when we back out of there that means the pilot of the engine was facing

(Testimony of Joseph Quinlan.)

me, and I was another 50 feet behind that on the car.

Q. In other words, it is your testimony that Mr. Bellamy was riding the end closest to the pilot and you were riding the other end?

A. I was riding the end closest to Redwood City. Remember, excuse me, this has been a long time; I am trying to tell you the best I remember, and I do know that on this particular move he was certainly in his place, and his place was farthest away from me at the Redwood City end, and I was at the harbor end.

Q. He was on one end of the same car that you were riding on the other end?

A. He was at the opposite end of the train, yes.

Q. My point is, Mr. Quinlan, is it your testimony that you were riding one end of the freight car and Mr. Bellamy was riding the other end of the freight car?

A. Yes, he wasn't at the same place I was. [310]

Mr. Hepperle: We offer to read at this time, your Honor, in evidence two statements, plaintiff's exhibit 42, and the other statement——

The Clerk: The other statement, formerly defendant Southern Pacific exhibit C for identification is marked Plaintiff's Exhibit No. 43.

(Form 2611 was thereupon marked Plaintiff's Exhibit No. 42 in evidence.)

(Testimony of Joseph Quinlan.)

(The statement relating to accident, formerly marked Southern Pacific Exhibit C was thereupon marked Plaintiff's Exhibit 43 in evidence.)

The Court: I don't know which part of those statements contain conclusions of law or rather hearsay statements, and so you will have to agree in reading them to omit that portion.

Mr. Hepperle: Counsel has identified the portion to which he objects, your Honor. We have no objection to omitting that portion, and if I may, I can show the portions to your Honor right now.

The Court: Yes, do that, would you?

(Documents exhibited to the court.)

The Court: Read now, leaving out——

Mr. Hepperle: I will, your Honor, omitting the two portions——

The Court: The two portions I have deleted on the ground that they are mere hearsay and conclusions of the witness. [311] In view of the fact that certain of these statements are going to be left out, I don't think those two documents should be put into evidence. In other words, then they would be all in. I think, on the other hand, you can read them into evidence, deleting the portions that I have indicated.

Mr. Hepperle: If your Honor please, if your Honor is going to delete that——

(Testimony of Joseph Quinlan.)

Mr. Digardi: There are other portions of his opinions and conclusions that we may also leave out then. We were going to offer the whole thing, but there are other opinions and conclusions of this witness that might also be left out.

Mr. Bledsoe: I make no objection to the other conclusions that he makes in there.

Mr. Hepperle: If I might proceed, your Honor, the first statement marked Plaintiff's Exhibit 42 is a printed form with a heading at the top, "Employee's Report of Accident. Do not use for grade crossing or other vehicular accidents."

"Employees signing this report must answer all questions applicable to the accident, using other side if more space is needed for any purpose. Conductors and engine foremen must show on reverse side of their report name and position of all members of train and engine crews.

"Division—Coast. Nearest station, Redwood Jct., State, Calif. Nearest Mile Post, 26. Date of accident, 4 April 49. Time of accident 5:35 p.m. [312] Clear, cloudy or foggy, clear. Raining or snowing, ... Daylight, dusk or dark, daylight. Kind of train, freight. Train No., X2345W. Lds., 11. Mtys., ... Tonnage in Ms., 1095. Engine No., 2345. Helper engine No., ... Direction, east. Speed, 40 MPH.

"Casualties to persons

"Name and address, William A. Bellamy; age 50;

(Testimony of Joseph Quinlan.)

Sex, male; married or single, single; Occupation, if employe, Bkmn; Nature and extent of injuries, broken left arm and left collar bone, possible rib fracture, possible internal injuries; estimated days disability, unknown.

"Names and addresses of witnesses: if employe, give occupation: F. G. Edwards, Engr., S.P. Co., J. F. Quinlan, Bkrmn, S.P. Co.

"What was done with or for injured persons, called ambulance. By whose direction, myself & conductor. Name and address of attending doctor ..... Names and addresses of relatives or friends, unknown."

The material in the next two questions and answers I will delete at this time, your Honor.

"Could accident have been avoided? Don't know. If so, how? ..... Did any jerk or rough handling of train cause or contribute to accident? No. If so, explain fully, ...

"Main, siding or yard track, Main. Straight or curved, right or left, curved left. Level, up or down grade, level. In cut or on fill, ...

"Distance run after accident, 35 feet. Was engine running forward or backward? Back. Was forward headlight burning? No. Was back-up headlight burning? No. If shoving or backing cars, who was on leading car? ..... Where was he riding on car and on which side? ..... What signals were given, by whom and by what means? None. Was engine bell ringing? Yes. How long before accident?

(Testimony of Joseph Quinlan.)

Continuously. Was engine whistle sounded? ..... Explain when or where and how many times, ... Initials and numbers of all cars and engine immediately involved in accident, None. Did any defect or other condition on or about engines, car, equipment, roadbed, tools, or other facilities cause or contribute to accident? If so, describe fully, None.

"Was view of engineer obstructed? Yes. If so, by what? Curve. Was view of fireman obstructed? Yes. If so, by what? Engine. Did you see the accident? Yes. Where were you when it occurred? Riding on rear car.

"Detail of cause and circumstances (if more space needed, use and sign other side.) While switching Paraffine Spur, Bellamy dropped off at switch on engineer's side after alighting stepped three feet away from cars acct. of curve just in time to be struck by car driven by J. E. Carlson; emp. P. P. Cement Co., Calif. BC 8992. He did not see car due to facing equipment.

"I, Jos. F. Quinlan, Jr., have read and understand the foregoing statement and it is true and correct to the best of my knowledge and belief.

Dated April 27, 1949. Occupation, Bkmn."

The other statement is dated September 11, 1949, witnessed by E. R. Lyons.

May it be stipulated, Mr. Phelps, Mr. E. R. Lyons is a claims agent for the Southern Pacific Company?

Mr. Phelps: Yes.

Mr. Hepperle: "Statement of J. F. Quinlan.

(Testimony of Joseph Quinlan.)

Sheet No. One. Present address, 388 West San Fernando Street, San Jose, California.

"Address through which you may always be reached, Above.

"Occupation, Brakeman. Employer, Southern Pacific Company. Business address, San Francisco.

"Where did accident occur? Redwood Harbor. Date, April 4, 1949. Hour, 5:30 p.m.

"Where were you when accident occurred? Riding the train. [315] "Names and addresses of other witnesses. Conductor Lechner might have seen the accident. Names and addresses of others who were nearby. Rest of the crew members. Driver of truck involved. Did you witness accident? Yes. Give full account of your knowledge of accident. My name is Joseph F. Quinlan and I am employed as a brakeman by the Southern Pacific Company. On April 4th, 1949, I was assigned to Extra 2345 West under Conductor Lechner. Other brakemen were Hussan and Bellamy. This is a local switch engine working down the peninsula to Redwood Junction. At about 5:30 p.m. we were out on the Redwood Harbor main line doing some work. We had left the main portion of our train on the west side of Bayshore Highway. We had several cars in behind the engine—I don't recall exactly how many, but there might have been two to five cars—and the engine was headed railroad east toward the Harbor. There were three cars behind the engine. The move was

(Testimony of Joseph Quinlan.)

west toward Bayshore Highway with the engine backing and the train was at that time on the Harbor main. Weather conditions were daylight, clear, and dry. Speed of the move was about 8-10 miles per hour. I was riding the side ladder of the trailing car on the engineer's side next to the roadway. Was at the rear end of the car. Bellamy was riding a side [316] ladder ahead of the engine also on the engineer's side. He was about two car lengths ahead of the engine. I do not know how many cars there were ahead of the engine. Bellamy was to drop off at the Paraffine Company spur switch and wait for the cut to clear the switch points and then was to throw the switch so we could put the trailing three cars into the Paraffine Co. spur. I do not know where brakeman Hussan was at the time of this move. He might have been in the cab of the engine. He was not in my range of vision. I could see Bellamy clearly from my position on the side of the car. As he neared the place approximately opposite the switch he started to step off the stirrup on which he was standing. I could see a light pick-up truck traveling westward on Harbor Road in the same direction as our move. Speed of truck was about 20 miles per hour. It was in the right-hand traffic lane. This truck passed our move. Just as soon as I saw Bellamy step out from the stirrup starting to detrain I realized the danger and yelled at him. Only yelled a loud shout at him. No particular words. He evidently did not

(Testimony of Joseph Quinlan.)

hear me. He stepped onto the ground and as he took a step or two more he went into the side of the passing truck. Bellamy, on the side of the car had been [317] facing west in the direction of our move, which is proper. He did not look over his shoulder before stepping off. If he had done so, he could have seen the truck easily. The truck driver had no time to try to stop or do anything to avert the accident. The front end of the truck did not hit Bellamy. As Bellamy went into the side of the truck a protruding section on the right side of truck behind the cab caught Bellamy. Bellamy was never actually facing the truck before being hit. He was hit on the left side from the rear. He was spun around several times as he went to the ground. I was about 6 car lengths and an engine length east of him at time he was hit. The truck driver and I picked him up and laid him down on the side of the road. The truck came to a stop in about 30 to 40 feet beyond the point of impact. At time of being hit Bellamy was only about two feet into the street from the north edge. I went to call for an ambulance while Brakeman Husson rendered some first aid treatment. I only saw Bellamy for about 5 minutes after he had been hit. He was conscious at the time. The move of the train had no bearing on the injury. Move was smooth and normal. OK as far as I could see. There were no jerks or lurches of the train which might

(Testimony of Joseph Quinlan.)

have caused Bellamy to lose his balance. He was in full control of his movements as he detrained. So it appeared to me as I watched him. I have worked out on the Harbor line off and on for the last seven years. All of us on that crew were acquainted with the track layout and the type of work to be done. We all had worked out there many times before. No definite instructions were given to us by the conductor as to which side of the train we were to work on or as to the danger involved by the road and the tracks being so close. We all knew that we would work on the engineer's side. It is past custom. We always work on the engineer's side whenever possible. The tracks and road both curve to the left going east out there. As far as I now recall we have always worked on the engineer's side out on the job when I have been on it. If we were to work on the fireman's side there might be some industrial obstructions to the clearance of the passing cars. The track is very close to the roadway. The tie ends are only about 4-6 inches from the north edge of the roadway's finished surface. Roadway is asphalt, I believe. In my own case I always make a point of looking for roadway traffic before stepping off a move out on this track. The footing, of course, is very good since it is right at the road's edge. I am quite sure no specific instructions [319] were given to Bellamy as to the danger involved account the road traffic because they would have been given to

(Testimony of Joseph Quinlan.)

all of us brakemen. None of us had any objections to working on the engineer's side because of past custom and it is actually the safer side. Scene of this accident was only about 600 to 700 feet east of Bayshore Highway.

"I, J. F. Quinlan, have read the above four-page statement and it is true and correct to the best of my knowledge and belief.

Dated September 11, 1949.

/s/ J. F. QUINLAN,

E. R. LYONS,
Witness.

Q. (By Mr. Hepperle): In other words, Mr. Quinlan, it is your testimony now that you were riding the same car that Mr. Bellamy was riding, but in the statement you gave to claims agent Lyons on September 11, 1949, you stated you were six car lengths away from Mr. Bellamy at the time the accident happened.

Mr. Bledsoe: That assumes a meaning to six car lengths, boxcar lengths, and it doesn't necessarily mean that. We will object to it on that ground.

The Court: Well, it is argumentative, anyway.

Mr. Hepperle: That is all.

Redirect Examination

By Mr. Bledsoe:

Q. Just one question. I notice in that [320] form

(Testimony of Joseph Quinlan.)

report that was read, that you have the train going 40 miles an hour.

A. That must be a typographical error. It certainly couldn't be going 40 miles an hour on a switching movement. I don't know why that appeared there. That is obviously a flagrant error. No one would write down the train was going 40 miles an hour, boxcars switching. I don't know how that came to be there.

Q. I think you said on direct it was 4 miles an hour? A. That is right.

Q. Is that more nearly correct?

A. That is absolutely right.

Mr. Bledsoe: I think that is all.

Mr. Phelps: I have no questions.

Recross-Examination

By Mr. Hepperle:

Q. Isn't it a fact, Mr. Quinlan, that the truck was going about 40 miles an hour when you first saw it? Isn't that correct?

A. I am not an authority on the speed of moving vehicles. There is only two ways; that is by checking the speedometer and measuring the distance that they stopwatch. Other than that it is pure hazard.

Mr. Hepperle: That is all.

Mr. Bledsoe: That is all.

Mr. Carlson, will you take the stand? [321]

JOSEPH E. CARLSON

called as a witness on behalf of defendant Pacific Portland Cement Company, sworn.

The Clerk: What is your name, sir?

A. Joseph Eugene Carlson.

Direct Examination

By Mr. Bledsoe:

Q. Where do you live, Mr. Carlson?

A. 353 Santa Clara Avenue, Redwood City.

Q. How long have you lived there?

A. That address, I lived there three and a half years.

Q. And how long have you lived down there in San Mateo County? A. About 18 years.

Q. Are you married? A. I am.

Q. And how old are you? A. 66.

Q. Are you employed by the Pacific Portland Cement Company? A. I am.

Q. How long have you been employed by that company? A. Oh, 18 years and 9 months.

Q. In April of 1949, this year, you were employed by them, were you? A. I was.

Q. And were you working for them the day of the accident? [322] A. I was.

Q. What was the nature of your job there?

A. Well, I am listed on the payroll as janitor and truck driver.

Q. Among your duties, what did you have to do at the end of the day's work?

(Testimony of Joseph E. Carlson.)

A. I had to take the mail, deliver the mail to the post office.

Q. Deliver it for going out, is that it?

A. Going out, that's right.

Q. On that particular day when this accident happened, you were driving a pick-up truck, were you? A. I was.

Q. And these pictures, defendant Portland Cement DD and plaintiff's exhibit No. 40 that I am showing you, do these pictures correctly show the condition of that truck as it was immediately after the accident happened? A. Yes, it does.

Q. That is the truck that you were driving?

A. That is the truck.

Q. Were you alone in the truck?

A. I was alone.

Q. I notice a cracked windshield there on the right hand corner. Was that made in the accident?

A. No, that has been done for years. That is expansion of the glass set in a steel frame; it just cracks the glass. It was fit in there too tight.

Q. I notice the right front fender looks somewhat battered and worn and chewed up.

A. This here is rust. In fact, the back fenders are—were recently put on before the accident; they were practically new. They rusted clear off, and this here was just about to fall off.

Q. The front ones?

A. That is right, the deterioration of salt water.

Q. I see lots of marks on this front fender.

(Testimony of Joseph E. Carlson.)

Were any of those marks made in this accident with Mr. Bellamy?

A. No, there wasn't any of them.

Q. You were going to what post office, Mr. Carlson? A. Redwood City post office.

Q. That is located about where? What streets?

A. It is on Jefferson Avenue between Broadway and Middlefield Road.

Q. Can you tell us about what time of the day the accident happened?

A. Well, not exactly the time; I'd say it was between 5:00 and 5:30, but I don't know exactly the time, because I didn't look at the clock at any time.

Q. How far do you have to travel on the road from your place where you work up to the place where this accident happened? Is that a matter of miles or is it a matter of feet?

A. From the cement plant to where the accident happened? [322B]

Q. Yes. A. It is over a mile.

Q. It is over a mile? A. Oh, yes.

Q. What is there in the way of plants, industrial plants between your Portland Cement place of business and where the accident happened? Are there any other businesses or plants out there?

A. Yes, there is quite a number of plants. There is the harbor, which have warehouses. There is the Standard Oil which has tanks, and Richfield Oil at that time—there is more now, but they was

(Testimony of Joseph E. Carlson.)

the only ones there at that time; then there is an asphalt plant, and then you come out to the Paraffine, and the Plant Rubber and Asbestos.

Q. With reference to traffic on that highway between your place of business and Bayshore Highway, was there very much traffic over that road around 5:00 to 5:30?

A. Yes, quite a lot of traffic. Most of the employees are going home. There is a lot of traffic over there.

Q. What about plant operations? Are there any plants out there that keep open after 5:00 o'clock?

A. Yes, Pacific Portland keeps open until midnight.

Q. What other plants? Do you know of any others?

A. Well, no, I don't. I don't know any oil companies, there are tanks coming in and out, but I don't know what time they [323] close.

Q. About the harbor itself, is it open all the time, or does it have a closing hour?

A. No, I think it is open all the time, because they haul gypsum out of there.

Q. Haul gypsum?

A. Gypsum that comes in on the boats is piled there in the harbor and trucks come in and pick that up.

Q. As you approach this area where the accidents happened, the road is on a curve, is it?

(Testimony of Joseph E. Carlson.)

A. Yes, that is right.

Mr. Phelps: Mr. Bledsoe, may I ask that your witness speak up? We can hardly hear back here.

The Court: Yes.

Mr. Bledsoe: Keep your answers up, Mr. Carlson, if you can, so that Mr. Phelps can hear you.

The Court: Mr. Bledsoe, it is 12:00 o'clock.

Mr. Bledsoe: This is a good time for that.

The Court: We will adjourn now until 2:00 o'clock this afternoon. Ladies and gentlemen of the jury, in the meantime, bear in mind the admonition that the court has heretofore given you. [324]

Afternoon Session

Monday, November 7, 1949, at 2:00 o'Clock

JOSEPH E. CARLSON

resumed the stand.

Direct Examination
(Continued)

By Mr. Bledsoe:

Q. Mr. Carlson, when you got to a point about in the right hand side of this diagram, which would be at the easterly end of the diagram, there is a shed off there to the north, is there, of some kind?

A. That is the Plant Rubber Warehouse.

Q. And when you reached that point on your way in with the mail on the day of the accident, about how fast were you traveling?

A. At that point about 25 miles an hour.

(Testimony of Joseph E. Carlson.)

Q. Now between that point and the time of the accident did anybody cross the road in front of you?

A. Yes, there were two men jumped off the head car and ran in front of me, crossed the road right in front of me.

Q. Did you change your speed any?

A. Yes, I had to put on the brakes at that time, at that point.

Q. And did you reduce your speed?

A. Yes, I kept on slow speed all the way around the curve.

Q. To about what speed did you reduce it at that time? A. About 15 miles an hour.

Q. Then you continued on in toward Redwood City in a westerly direction, did you? [325]

A. I did.

Q. Then after that occurrence did you notice a man hanging on a boxcar?

A. Yes, I seen a man hanging on a boxcar.

Q. State whether or not the train that he was hanging on was moving or standing still.

A. Moving very slowly when I was coming around the curve.

Q. Did you notice in particular which end of the boxcar he was on?

A. He was riding the end next to the engine.

Q. Right next to the engine. Can you tell us whether or not the train was on the main line

(Testimony of Joseph E. Carlson.)

tracks that run next to the highway or whether some of it was on the spur that runs——

A. No, it was all on the main line next to the highway.

Q. At least that was your observation of it?

A. That's right.

Q. Did you change the position or direction of your automobile at any time after you reached that shed or opposite that shed?

A. No, I cut close to the center all the way around the curve.

Q. What part of the highway were you driving on at the time you saw this man hanging on the boxcar?

A. I was still astraddle of the center line.

Q. You were straddling the center line?

A. Yes.

Q. By that do you mean that part of your car—— [326]

A. Part of my car was across the line.

Q. On the wrong side of the road?

A. That is right.

Q. Was that the position your car was in as you rounded the curve? A. That is right.

Q. What, if anything, happened after that? Will you describe to us just what happened and how the accident occurred?

A. Well, I was going along the course around the curve, and just as I got by this man hanging on the boxcar, I just got a glimpse out of the cor-

(Testimony of Joseph E. Carlson.)

ner of my eye of him letting loose, and then I felt a bump, and I came to an immediate stop.

Q. Did you actually see him come in contact with your car? A. No.

Q. You did see him start to swing off of the boxcar?

A. I did see him let loose, just caught a glimpse of him letting loose.

Q. And at that time what position was your automobile in with reference to him?

A. How do you mean?

Q. Well, was the front end of your car about up to where he was, or even with him?

A. Oh, the front end of the car I would say was past. I just got a glimpse out of the corner of my eye of him letting loose.

Q. At the time that that happened, how fast were you going? [327]

A. About 15 miles an hour.

Q. When you stopped your car, from the time you felt this bump until you stopped it, did you keep in the center of the highway or did you bring your car over to the right or left?

A. Oh, I kept in the same direction, the same.

Q. Did you remain seated in your car or did you get out? A. I got out immediately.

Q. Where did you go?

A. I went over to the man that was injured.

Q. Where was the man that was injured lying when you got there?

(Testimony of Joseph E. Carlson.)

A. He was lying right by the road where he got hit, with his head towards the harbor and his feet upon the engine, the running board of the engine; in fact, he put one foot up and then the other.

Q. That would be at the head end of the engine? A. Head end of the engine.

Q. And his head was pointed somewhat toward the harbor, toward the east?

A. Pointed toward the harbor.

Q. What is your estimate of how far you traveled after you felt the bump until you stopped?

A. I estimate it about 25 feet.

Q. Did you take any measurements for yourself? A. No, none whatsoever.

Q. Now, from the time that you stopped your car immediately after [328] the accident until police officers arrived, did you move your car at all?

A. No, I never moved it.

Q. Did anyone move it? A. No.

Q. Can you tell about how soon the police officers came after the accident in minutes?

A. Oh, it would just be a guess; I should say eight to ten minutes.

Q. From the time the accident happened until they arrived? A. Yes.

Q. Did they get there before the ambulance did or not? A. No; they got there before.

Q. Did you, immediately after the accident and before you got out of your car, say to the engi-

(Testimony of Joseph E. Carlson.)

neer on the train that you were late and in a hurry to get to the post office with the mail?

A. I did not.

Q. Did you state anything like that to anybody there after the accident? A. No.

Q. Now, at the time you left your plant was your mail ready for you at the usual time, or was it late?

A. No, it was late that evening. It should be ready at 5:00 o'clock, but this night it was late.

Q. You fix the time of the accident between 5:00 and 5:30? [329]

A. Yes, that is what I guessed it.

Q. Did the engineer on the train say anything to you after the accident?

Mr. Phelps: Objected to as not binding on the defendant Southern Pacific Company. It wouldn't be within the course and scope of his employment to make any statement.

Mr. Digardi: We join in the objection; it isn't binding on the plaintiff in this action either, your Honor.

The Court: I will sustain the objection.

Mr. Phelps: Hearsay, self-serving.

Mr. Bledsoe: The objection is sustained to that, your Honor.

The Court: It seems to me that on the cross-examination of Mr. Edwards you did ask him a question——

Mr. Bledsoe: I asked him——

(Testimony of Joseph E. Carlson.)

The Court: ——with respect to something you claim he said. I think you put that as a leading question. Then I will admit that, for the purpose of impeachment, not otherwise.

Mr. Digardi: If your Honor please, my recollection of the record is he might have made that statement with respect to what he might have said to the police officers. He laid a foundation for possible impeachment with the police officers, but not with this witness, your Honor. That is my recollection of it. [330]

Mr. Bledsoe: I think I asked this question of the engineer.

The Court: Put the question you ask with respect to what he said to Mr. Carlson, not with respect to what these other people said.

Q. (By Mr. Bledsoe): Did the engineer after the accident come to you and pat you on the back and say to you, "Don't feel badly; it wasn't your fault, and I hollered at the man"?

A. That's right.

Mr. Phelps: Same objection. It isn't binding on the defendant Southern Pacific.

Mr. Digardi: We object to that, that it is without proper foundation technically.

The Court: Your objection is overruled and the evidence is not admitted in any respect as binding on the Southern Pacific. The answer may stand. The answer was what?

A. Yes, he did.

(Testimony of Joseph E. Carlson.)

Q. (By Mr. Bledsoe): Did the police ask you questions about the accident?

A. Not many; they went through the routine checkup, driver's license, where did he hit, and a few——

Q. Well, they asked you questions about the accident, did they? A. Yes.

Q. Did you remain there until an ambulance came?

A. Yes, I was there until the ambulance came.

Q. After the accident had all been investigated and was all over [331] and the ambulance had gone with the injured man, did you go into Redwood City? A. I did.

Q. And did you mail the mail that you had with you? A. I did.

Q. Then when were you to go off duty that day?

A. That evening?

Q. Yes. A. At 8:00 o'clock.

Q. 8:00 o'clock. So you went back to the plant again, did you? A. Yes.

Mr. Bledsoe: I think that is all.

Cross-Examination

By Mr. Digardi:

Q. Mr. Carlson, how long did you say you have been employed by the Pacific Portland Cement Company?

A. Right up to the present time 18 years and 9 months.

Q. During that entire period has it always been at this same plant at Redwood City Harbor?

(Testimony of Joseph E. Carlson.)

A. That is right.

Q. So during this 18 years you have traveled back and forth over the same highway many, many times to and from work, at least every day or many times a day over that whole period, is that correct? A. Yes, that's right.

Q. And you stated also you had your hours of work, or did you, [332] were from 6:00 a.m. to 10:00 a.m. in the morning, and then additional hours in the evening?

A. It was a split shift, 6:00 a.m. to 10:00 a.m., 4:00 to 8:00 p.m.

Q. Did you punch a time clock at all?

A. No.

Q. Or were you just working roughly those hours?

A. That is my hours, and I had so much work; if I got through sooner I left before that.

Q. In other words, if you finished your work at night, if you finished earlier than 8:00 o'clock, you didn't have to wait around till 8:00 o'clock came to go home? A. No.

Q. The sooner you finished up work in the evening, the sooner you could go home, is that correct? A. That is right.

Q. And of course, as you stated, this particular night you were late, rather the mail was late for you; that is correct?

A. It was later than usual. Usually it was about 5.00 o'clock; this evening it was after 5:00.

(Testimony of Joseph E. Carlson.)

Q. You were also, Mr. Carlson, familiar with the fact that the railroad tracks ran alongside of this highway as is described on the diagram and shown in the pictures, particularly calling your attention to plaintiff's exhibit No. 31?

A. Yes, I am familiar with the highway. [333]

Q. And you are familiar with the fact that it runs right alongside the railroad track?

A. Absolutely.

Q. And you are also familiar with the fact that around 5:00, or at least that particular time every night the railroad men are switching boxcars on this particular track in the evening; that is the customary thing for them to be doing at this particular time of night, isn't that true, Mr. Carlson?

A. Well, not always, no.

Q. But you knew that they did?

A. More or less, some place on the line between that time and the time they go home.

Q. So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact? A. Yes.

Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track? A. I did.

Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact?

A. That is right.

(Testimony of Joseph E. Carlson.)

Q. Now, Mr. Carlson, approximately how far away from Mr. Bellamy were you when you first actually observed him? [334]

A. Just as I came around the curve I could see him hanging on the car.

Q. You could see him hanging on the boxcar as you were back here around the curve?

A. As I was coming around the curve, if you keep your eye on it continuously—more or less I was looking toward him, I could see him.

Q. You watched him, followed him, kept him in your line of vision from the time you first observed him coming around the curve until the time of the accident, is that correct? A. Yes.

Q. Then the next thing you knew, when the front end of your car had just about passed him, you got a glimpse of him out of the corner of your eye dropping off of the car, is that correct?

A. Yes.

Q. Then the next thing, you heard the thump?

A. No.

Q. Or felt the bump against your car?

A. I felt the bump on my car.

Q. And it was at that time that you first applied the brakes, is that correct? A. Yes.

Q. Mr. Carlson, I show you defendant's exhibit CC for identification and ask you if that is your signature?

A. That is my signature. [335]

(Testimony of Joseph E. Carlson.)

Q. Can you tell us—it bears the date April 6, 1949—— A. That is right.

Q. Was that approximately the date this was——

A. The morning of the 6th.

Q. I will hand you this. You can keep that in your hands, Mr. Carlson. Incidentally, have you read that statement recently?

A. No, not this one, no.

Q. When was the last time you read that particular statement?

A. A couple of weeks ago, I guess.

Q. A couple of weeks ago; was that your answer?

A. I think so, yes, sir.

Q. Are you sufficiently familiar with the contents that I could ask you questions concerning that, or would you like an opportunity to look it over now?

A. I think I know what is in here; I stated nothing but what is right.

Mr. Bledsoe: Put it in evidence if you want to, counsel.

Q. (By Mr. Digardi): Mr. Carlson, are you positive you saw Mr. Bellamy hanging on the side of the box car? A. Absolutely.

Q. I call your attention to the second page of this statement and the fourth line from the bottom. Maybe it is on the back. I believe on that copy it is on the back of page 1. I call your attention to the language beginning with where I have my finger. Does it not state there, "I believe I noticed a man hanging on to the step"? Does it so state?

(Testimony of Joseph E. Carlson.)

A. That is what it says there, "I believe I noticed a man hanging on the step."

Q. When did you first determine that you actually *saw man* standing on the step of the box car? When did you decide that, Mr. Carlson?

A. I knew it all the time.

Q. Were you trying to mislead somebody when you gave this particular statement?

Mr. Bledsoe: I object to that as argumentative.

The Court: That is argumentative.

Q. (By Mr. Digardi): Who took that statement from you, Mr. Carlson?

A. The company investigator.

Mr. Bledsoe: I object to that on the ground it is incompetent, irrelevant and immaterial, who took it.

Mr. Digardi: I think it is very relevant who took the statement from him. If we had taken it, it would be quite different.

The Court: I will allow the answer.

Mr. Digardi: Who took the statement from you?

A. The company investigator.

Q. And does it not next state: "The next thing I realized was that I felt a bump"? Does it not so state following the language I just read? [337]

A. That is right.

Q. Does it say any place in the statement at all, Mr. Carlson, that you observed Mr. Bellamy drop off the side of the box car?

(Testimony of Joseph E. Carlson.)

Mr. Bledsoe: Objected to on the ground the statement speaks for itself.

The Court: The statement speaks for itself.

Q. (By Mr. Digardi): Mr. Carlson, you stated on direct examination that you kept close to the center of the highway from the first time you came around the curve and continued on the center line all the way and never changed your course, is that correct? A. That is right.

Q. Do you recall your deposition having been taken on the 1st day of September 1949 when you were in our offices with your counsel present?

Mr. Bledsoe: I will stipulate whatever you want to read, that he so stipulated at that time. Just read it.

Mr. Phelps: May it please the Court, we were not present at the deposition, so may it be offered as a matter between the Pacific Portland Cement and the plaintiff, not binding on the defendant Southern Pacific either as impeachment of their witness——

The Court: That is the fact. At this testimony the Southern Pacific representatives were not present; it is not binding on the Southern Pacific. [338]

Mr. Digardi: May it be stipulated, Mr. Bledsoe, that at that time and place the witness testified as follows: This is on page 6, beginning on line 2 of the deposition:

"Q. And when did you first see Mr. Bellamy?

(Testimony of Joseph E. Carlson.)

A. Well, I first seen him when I got practically to him, I seen him hanging on to the box car.

Q. And then what happened?

A. Well, I kept on; I pulled out towards the center of the road to get more room, not knowing what he was going to do."

Is that so stipulated?

Mr. Bledsoe: You didn't finish the sentence, counsel.

Mr. Digardi: Well, the other part——

Mr. Bledsoe: You didn't finish the answer.

Mr. Digardi: All right. "I was just going on slow around the curve, which I always slow down to. The first thing I knew I felt a bump on the truck."

Mr. Bledsoe: I will stipulate he gave that answer to that question.

Q. (By Mr. Digardi): Mr. Carlson, do you recall about an hour after the accident, when the members of the crew were switching cars in the cement plant after you had returned from your trip to the post office—do you recall that time?

A. I remember talking to them down to the gate.

Q. You went down to see—— [339]

A. I asked them to give me their names, because I had to make out a report to the company.

Q. That is correct. Now calling your attention to that particular time, Mr. Carlson, did you not speak to the conductor at that time and place, and

(Testimony of Joseph E. Carlson.)

did he not ask you how the accident happened and you stated to him——

Mr. Bledsoe: If the court please, we are going to object to this, because it is something that happened after the accident and apparently not part of the res gestae, so it would be something that wouldn't be binding on the defendant corporation.

The Court: That may be true. It may be in the nature of impeachment.

Mr. Digardi: It is that, your Honor. I am laying a foundation now for impeachment.

Mr. Phelps: Then, if your Honor please, an objection may go; as far as we are concerned it is not binding on the defendant Southern Pacific Company in any way; it is a matter between the Pacific Portland and the plaintiff.

Q. (By Mr. Digardi): Did you not state to the conductor at that time, in answer to a question as to how it happened, "Damned if I know, the first thing I knew that man was there in front of me"? Did you not so state? A. I did not.

Q. And did you not further state, "I know you work there every day"? [340] A. No.

Q. The fact is, though, that you did know that a train crew worked there every day, isn't that a fact? A. I did, yes.

Q. Isn't it a fact, Mr. Carlson, that you had been warned by various members of the railroad crews about the way you drove around these box

(Testimony of Joseph E. Carlson.)

cars and the men while they were switching box cars many times in the past?

Mr. Bledsoe: We will object to that as incompetent, irrelevant and immaterial.

The Court: Well, I think you ought to call his attention to the name of the person, don't you?

Mr. Digardi: Well, we will withdraw the question.

Q. Isn't it a fact, Mr. Carlson, that in particular one conductor by the name of C. D. Moore warned you many times about the way you drove around the spots where the men were switching box cars and in the highway?

Mr. Bledsoe: Same objection.

A. I don't remember.

Mr. Phelps: As to the defendant Southern Pacific Company may I enlarge upon the objection, that it wouldn't be binding upon the defendant Southern Pacific Company; it isn't part of the case in chief against the Southern Pacific, without notice to the Southern Pacific.

The Court: The answer was "no", anyway. [341]

Q. (By Mr. Digardi): Now a day or two after the accident, Mr. Carlson, were you present when some photographs were taken on behalf of the defendant of the scene of this accident?

A. No, I was not.

Q. You were not present at that time?

A. No.

(Testimony of Joseph E. Carlson.)

Mr. Digardi: I think that is all.

Mr. Phelps: I have no questions.

Mr. Bledsoe: No further questions, your Honor.

The Court: All right.

Mr. Bledsoe: We rest, if the court please.

The Court: Any rebuttal?

Mr. Digardi: We have one witness, your Honor, Mr. Lechner.

GEORGE P. LECHNER

called as a witness on behalf of the plaintiff, in rebuttal, previously sworn.

The Court: You have already been sworn, Mr. Lechner. Just take the stand.

Direct Examination

By Mr. Digardi:

Q. Mr. Lechner, do you recall an incident about an hour after the accident when Mr. Carlson came and visited you and members of the crew to ascertain the names of the members of the railroad train crew? [342]

Mr. Phelps: There is an objection, if it may please the court, as to any testimony in rebuttal. We didn't put on any case. There is no occasion for any rebuttal as to the defendant Southern Pacific Company.

The Court: That is right. This only applies to the other defendant, Pacific Portland Cement.

A. Yes, I recall.

(Testimony of George P. Lechner.)

Q. (By Mr. Digardi): Did you at that time and place ask Mr. Carlson how the accident happened?

A. Well, Mr. Carlson came to me at the shed there where we receive the switch lists, and he asked me if I could give him my name and the name of the engineer and the name of the injured man and the addresses, as he had to make out a report. And I so furnished Mr. Carlson with that information at that time. The crew was working down the line, that is, my crew, and he asked me these questions and after I gave——

Mr. Bledsoe: It is understood that this conversation we are objecting to it on the ground it is not part of the res gestae and would not be binding as evidence against my client.

The Court: All right.

Mr. Digardi: This is merely impeachment, your Honor.

The Court: I will overrule the objection.

Mr. Phelps: We rely upon the same grounds.

The Court: Yes.

The Witness: What do I do? Answer the question? What [343] was the question?

Q. (By Mr. Digardi): Did you ask him then——

A. Then after I gave him the information, I said to Mr. Carlson, I said, "I didn't see the accident. How did it happen?" And he said, "Well, I'll be damned if I know. First I know the man

(Testimony of George P. Lechner.)

was right in front of me, and I tried to miss him, but I guess I didn't."

Q. Did he say anything further with respect to the accident? I will withdraw the question.

State whether or not at that time and place he said to you, "I know you work there every day"? Did he state that?

A. Yes, he said—well, I think I said that to him, I said, "You know we work around there all the time, don't you?" He said, "Yes, I see you working there every day."

Mr. Digardi: I think that is all.

Cross-Examination

By Mr. Bledsoe:

Q. Mr. Lechner, you refused to give Mr. Carlson your address, didn't you, after this accident?

A. No, sir.

Q. Didn't you refuse to give the police a statement on this accident?

A. No, sir, the police never asked me for a statement of the accident.

Q. In that hour before you talked to Mr. Carlson, did you ask the members of your crew how the accident happened? [344]

A. I don't believe so, because after the man was removed to the hospital we were getting quite a bit late; we had to get to the cement plant and I had to then take part as a brakeman and help with the work so we finished the work at that plant spur, and then I called the brakeman to go back and get

(Testimony of George P. Lechner.)

the train, we would go on to the harbor, switch the cement plant, and then to the rest of the work and come down, so that we could get back in time. I caught my caboose and made out my report between the time we left the plant spur. I was back there all the time. I only had two men; they had to ride ahead and handle the boxcars.

Q. So you didn't know anything about this accident happened until you asked Mr. Carlson about it, is that right?

A. Well, as to that, I wouldn't want to swear under oath that I talked to him before I talked to any other member of the crew, but it seems to me that he was at the gate as soon as we got out to the cement plant, Mr. Carlson.

Q. You were at the scene when the police officers arrived, weren't you?

A. No, I went to phone. When I came back from phoning, the police officers and the ambulance were both there.

Q. They were both there when you got back from phoning?

A. Both the police officers and the ambulance, I think, had Mr. Bellamy on a stretcher getting ready to put him in the ambulance. [345]

Q. Where did you go?

A. I went into the old Plant warehouse.

Q. Did you phone to anyone besides the police and the ambulance?

(Testimony of George P. Lechner.)

A. Yes, sir, I phoned the chief dispatcher in San Francisco at the Southern Pacific Company to notify him that I had ordered an ambulance and that the injured man was being taken to the nearest hospital.

Q. While the police and you were there, you knew the police were investigating the accident, did you not? A. Why, yes.

Q. And in the course of that investigation while you were there and the police were there, didn't anybody make any explanation how the accident happened?

A. I asked the police officer, and he said—the police officer at the time said, "I have to make out a written report of this accident," and he didn't give me any facts. I said, "I have to have some facts for my report." And he said, "Well, this report will be filed at the Redwood City Police Department, and your company can get the facts from there after I write it up, so he wouldn't give me any information.

Q. Mr. Edwards,—did he refuse to give you any information? A. No.

Mr. Bledsoe: That is all. Thank you.

Mr. Digardi: No questions.

Mr. Phelps: No questions. [346]

Mr. Digardi: The witness may be excused.

The plaintiff rests, your Honor.

Mr. Phelps: We have some matters to take up with the court.

The Court: All right; the jury will be taken to the jury room.

Before you go, ladies and gentlemen, bear in mind the admonition I have heretofore given you.

(The following proceedings were had out of the presence of the jury.)

MOTION FOR DIRECT VERDICT

Mr. Phelps: May it please the court, at this time, on behalf of the defendant Southern Pacific Company, I move that a verdict be directed in favor of the defendant Southern Pacific Company pursuant to the appropriate rules of the Federal Rules of Civil Procedure, and particularly Rule 50.

* * *

The Clerk: Should the record also show that Mr. Bledsoe has made a similar motion and that it has been denied?

Mr. Bledsoe: I was going to request that I might make a motion for a directed verdict on the same grounds.

The Court: On all of the grounds that you made on your motion for a dismissal?

Mr. Bledsoe: Yes, your Honor.

The Court: And on all of the grounds that were made by Mr. Phelps which are available to you?

Mr. Bledsoe: Yes, your Honor.

The Court: And any grounds stated in your argument?

Mr. Bledsoe: Yes, your Honor.

(At this point the jury was brought into the court room.) [352]

The Court: Ladies and gentlemen, there are some matters which counsel are discussing with me which we concluded will take longer than a few minutes, and we don't want to keep you waiting. In addition to that, I have contracted a very heavy cold, and as it is likely the discussions will take until after three, I thought it better that we not keep you waiting and let you go until tomorrow morning. I hope that is satisfactory to you. When we adjourn, we will adjourn until tomorrow morning, as far as the jury is concerned, at 9:30 in the morning, if that is satisfactory to you. You may be excused until that time. In the meantime, bear in mind the admonition of the Court heretofore given you.

(Whereupon the jury retired from the court room.)

The Court: Gentlemen, under the rule I am required to advise you in a general way of the nature of my instructions so that you can base your arguments upon them. [353]

* * *

We will adjourn until tomorrow morning at 9:30.

(Thereupon an adjournment was taken until Wednesday, November 8, 1949, at 9:30 o'clock a.m.) [365]

In the Southern Division of the United States District Court for the Northern District of California

No. 28909-E

Before: Hon. Herbert W. Erskine,
Judge.

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

REPORTER'S TRANSCRIPT
INSTRUCTIONS TO THE JURY

November 9, 1949

Appearances:

For the Plaintiff:
ROBERT R. HEPPERLE, ESQ., and
EDWARD DIGARDI, ESQ.

For Defendant Southern Pacific Company:
LOUIS PHELPS, ESQ.

For Defendant Pacific Portland Cement Company:
LEIGHTON BLEDSOE, ESQ.

Morning Session

Wednesday, November 9, 1949, at 10:00 o'Clock

The Clerk: Case of Bellamy vs. Southern Pacific Company and Pacific Portland Cement Company, further trial.

The Court: Ladies and gentlemen, the presentation of the evidence in this case has been concluded. You have listened to the argument of counsel. Let me say to you first of all that it is your exclusive province to judge the facts of this case. It is the exclusive function of the court to instruct you as to the applicable law, which in turn you should apply to the fact. I express no opinion as to the facts of the evidence, nor do I wish you to understand or conclude from anything I may have said during the trial or during the course of these instructions that I have intended, directly or indirectly, to indicate any opinion on my part as to the facts or as to what I think your findings should be. Ladies and gentlemen, you and you alone must decide the facts.

In your deliberations you must wholly exclude any sympathy or prejudice from your minds. Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively is a matter for your sole and exclusive judgment.

A witness is presumed to speak the truth, but this presumption may be negatived by the manner in which he testifies, by his motives, or by evi-

dence as to his character, reputation for truth and honesty and integrity. In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or discard or reject the whole or any part thereof. If it is shown that a witness has testified falsely on any material matter, you should distrust his testimony in other particulars; and in that event, you are free to reject all of that witness' testimony.

This being a civil action, the plaintiff has the burden of proof. A preponderance of the evidence is sufficient to sustain that burden. By a preponderance of the evidence is meant that the testimony on behalf of one party has greater weight and more convincing weight than that of another party. If equally balanced, it does not necessarily depend upon the number of witnesses testifying, but rather upon the character of the testimony with reference to its probab*ly* truth or falsity. In determining the preponderance of the evidence, it is your duty to scrutinize carefully the testimony given, and in so doing, consider the following: A, the circumstances under which the witness testified; B, his demeanor and manner on the stand; C, his intelligence; D, the connection or relationship which he bears to either party; E, the manner in which he might be affected by the verdict; F, the extent to which he is contradicted or corroborated by the other evidence, if at all; and G, any other matter which reasonably sheds light on the credibility of the witness.

You must disregard entirely any testimony stricken out by the court or any testimony to which an objection has been sustained. The attorneys, in their arguments, have commented and argued upon the facts; if you find any variance between the facts as testified to by the witness and what has been stated to you by the counsel to be the facts, to the extent of such variance you must consider only the facts as testified to by the witness.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnessses have testified to the contrary, if from the whole case, considering the credibility of witnesses and after weighing the various factors of the evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of one witness.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

In questions asked of you concerning your qualifications as a juror, some mention was made of the matter of insurance. I instruct you, you cannot bring in a verdict against any insurance company. I further instruct you that no insurance company is a party to this proceeding. I instruct you that it would be contrary to your oaths as jurors to

discuss either collectively or individually the subject matter of insurance. That is not and cannot be an issue in this case, and has no relationship whatever to any issue or question. This case must be decided by the jury entirely under the facts and law, and your verdicts must not be influenced by any other consideration whatsoever.

While there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The rules of law applicable to the defendants are somewhat different, and these differences will be pointed out to you in the ensuing instructions. However, the gist and gravamen of plaintiff's action is based upon the claim that each of the defendants was negligent, so I will first give you the law respecting negligence.

The plaintiff must prove negligence, or there can be no recovery. The defendants are not insurers, they are not to be held responsible simply because there was an accident and injury, if that was without fault on their part. Nor is a railroad defendant liable simply because there may be some danger in connection with the normal and customary railroad operation. Nor is it enough to show only that if the defendants had acted in some different way, different from the way in which they did act, the accident might not have happened. To the contrary, you cannot find against defendant unless the plaintiff proves two things by a preponderance of the

evidence; first, that there was negligence in a particular charge in a complaint, and second, that such negligence, if any there was, was the proximate cause of the accident.

A defendant does not have the burden of proving freedom from negligence. To the contrary, the burden of proving negligence is on the party who charges it; and in this case, as to any claimed negligence of a defendant, unless the plaintiff sustains the burden of proving it by a preponderance of the evidence, the verdict must be in favor of such defendant. Negligence is the omission to do something which an ordinary, prudent person would have done under the circumstances, or doing something which such person would not have done under the same conditions. It is not absolute or intrinsic, but always relates to some circumstances at some time, place, or person.

By ordinary care is meant that degree of care which an ordinary, careful and prudent person would have exercised under the same or similar circumstances; and the failure on the part of any person or corporation to exercise that degree of care is negligence. Negligence may be active or passive in character, and in order to establish negligence, it is not incumbent upon the plaintiff to prove that the defendant intended to commit the injury he complained of.

I have also mentioned to you that the plaintiff may not recover unless it is shown that some negligence or failure on the part of the defendant

charged proximately caused the injury to him. The term "proximate cause" is defined to mean that which, in the natural, continuous sequence, unbroken by any new independent cause, produces the event, and without which that event would not have occurred. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case each of the participating acts or omissions is regarded in law as a proximate cause. When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contributed concurrently and as proximate causes to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution.

You are instructed that a corporation is an artificial person, a creature of the law. It must necessarily act through its servants and agents and employees. An act of an employee within the scope of his employment or in the course of his employment is an act of his employer, and the negligence of the employee in the performance of his duty is the negligence of the employer.

In instruct you that in deciding questions of negligence and contributory negligence, you must not permit yourself to be influenced in the slightest

degree in your duties as jurors by sympathy, passion or prejudice. The questions of negligence, of contributory negligence, are necessarily questions of fact, and they must be decided, considered and judged by you without sympathy or any other emotion influencing your mind in any manner whatever.

While it is incumbent upon the plaintiff to prove his case by a preponderance of evidence, the law does not require of the plaintiff proof amounting to a demonstration or beyond a reasonable doubt. All that is required in order for a plaintiff to sustain the burden of proof is to produce such evidence which, when compared with that opposed to it, carries the most weight, so that the greater probability is in favor of the party upon whom the burden rests. I instruct you that if, after the consideration of this whole case and the instructions of this court, your minds are in doubt or uncertainty as to the negligence of either of the defendants, or if you believe that the evidence is equally balanced as to either of the defendants or both of them, then it is your duty to render a verdict in favor of the defendant, or both of them, as to which the evidence is so equally balanced.

You cannot return a verdict against either of the defendants merely because an accident happened and an injury resulted from it. The mere happening of an accident raises no presumption or inference of negligence on the part of a defendant. The plaintiff has the burden of proving by a preponderance of evidence that the defendants were guilty

of negligence which proximately caused the injury complained of. Sometimes accidents happen and persons are injured where there is no fault on the part of any party involved in the accident. Such accidents are called inevitable or unavoidable accidents. If you find that the accident out of which this case arises was an unavoidable accident, then the plaintiff is not entitled to recover anything and your verdict must be against the plaintiff and in favor of the defendants.

The issue of contributory negligence on the part of the plaintiff has been raised in this action by defendants. Contributory negligence is the want of ordinary care on the part of the person injured by the actionable negligence of another, combining and concurring with such negligence and proximately contributing to the injuries sustained by such person. Ordinarily the burden of proof rests upon the defendant charging contributory negligence on the part of the plaintiff to prove by a preponderance of the evidence such contributory *evidence*. The exception being when the testimony offered by or on behalf of the plaintiff shows and establishes such contributory negligence. In other words, the burden of proof as to contributory negligence is met if the same is established by the preponderance of the evidence in the case, regardless of whether such evidence was introduced by the plaintiff or by the defendant or by both.

I will now give you the rules of law applicable to the issues raised by the pleadings between the

plaintiff and the defendant Pacific Portland Cement Company, which, for the sake of brevity, I will hereafter refer to as the Cement Company. It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent.

You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed which endanders the safety of persons or property." Under this statute it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to

be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff *is* such a position.

A person who himself is exercising ordinary care has the right to assume that others too will perform their duty under the law. And he has a further right to rely and act upon that assumption. Thus it is not negligence for such a person to fail to anticipate injury which can come to him only from the violation of law or duty by another.

In its answer to plaintiff's complaint, the defendant Cement Company has denied negligence on its part and has alleged as an affirmative defense that the plaintiff, William A. Bellamy, was guilty of contributory negligence. If proved, this defense of contributory negligence is a complete defense to this action as against the Cement Company. It is the law of this state that if the plaintiff, William A. Bellamy, was guilty of any negligence which amounted to a want of ordinary care, and which proximately contributed to the accident and his

resulting injuries, he cannot recover damages from the Cement Company. This is true regardless of how slightly such negligence on the plaintiff's part may have contributed. It is also true regardless of whether or not the defendant Cement Company or its driver was negligent, or how negligent he or it may have been. The law does not permit you to weigh the amount of negligence, if any, as between the plaintiff and the defendant Cement Company. That is to say, the law is not concerned with how negligent either party may have been, if both were negligent and such negligence proximately contributed to the injuries of the plaintiff. Or stated in another way, the plaintiff cannot excuse any negligence of his own on the ground that the defendant Cement Company or its driver was also negligent, or on the ground that the defendant or its driver was more negligent than the plaintiff. If you find from the evidence that the plaintiff was guilty of any negligence amounting to a want of ordinary care which proximately contributed to the accident in question and his resulting injuries, your verdict must be for the defendant Cement Company. You are instructed that contributory negligence, should you find it to exist, is a complete defense and will bar any recovery of any damages against the Cement Company.

In this connection, the defendant Southern Pacific Company is in a different situation, and you should distinguish carefully between the rules of law applicable to each defendant in connection with

this defense. In other words, contributory negligence is a complete defense, if you find it to exist, insofar as the Cement Company is concerned.

If you find from the evidence that the plaintiff was crossing a road at a point other than within the crosswalk, that plaintiff did not have the right of way, you are instructed that section 564 of the Vehicle Code of the State of California, in force and effect at the time of this accident, provides as follows:

"Pedestrian to walk on the left side of the roadway. No pedestrian shall walk on any roadway outside of a business or residential district, otherwise close to the left hand edge of the roadway."

It was the duty of the plaintiff, William A. Bellamy, to use reasonable care, to look for vehicles on the road before he attempted to use it. This duty is not fulfilled by looking and failing to see that which is readily and clearly visible; when to look is to see; and the mere statement that one did look and could not see will be disregarded as testimony.

I instruct you that if there are two ways of performing an act, one of which is dangerous and the other is safe, a person who, with knowledge of the danger and the existence of both of the ways, voluntarily chooses the perilous one, is guilty of negligence. You are instructed, a person crossing a highway in front of an approaching vehicle cannot close his eyes to danger, if any, in reliance upon the presumption that the other party will use reasonable care and prudence and obey the traffic laws.

You are instructed that a pedestrian who attempts to cross a highway at other than a regular crossing place must exercise greater precaution than at an established crossing, and the observance of due care under such circumstances is not fulfilled by merely looking to the left and the right as he steps upon the highway. He must exercise that care during all the time that he is crossing. It is the duty of a pedestrian on a highway, as the act of an ordinary, prudent person, immediately before placing himself in a position of danger, to look in the direction from which danger, if any, is to be anticipated. This is a continuing duty and is not met by looking once and then looking away. A motorist exercising ordinary care has the right to assume, until there is evidence to the contrary, that a person on the highway will exercise his faculties and use reasonable care for his own safety.

You are instructed that negligence is not based upon the possibility of avoiding an accident. Mr. Carlson, the driver, cannot be charged with negligence simply because he might have avoided the accident had he acted differently. If that driver did all that an ordinary prudent person would do under the circumstances to avoid the accident in question, said driver is not chargeable with negligence, and the defendant Cement Company is not liable.

There is no presumption which the operator of an automobile is required to indulge when driving over the public highways, that persons alongside

the highway in front of him will not exercise the care requisite to their own safety, or that such persons are without intelligence and discretion enough to do so in the absence of any evidence to the contrary. A motorist who is himself exercising ordinary care has the legal right to assume that pedestrians ahead of him or persons about to become pedestrians upon the highway are intelligent enough to know that it is their duty while so using the highway to exercise the amount of care necessary for their own safety, and that they will do so. Such a motorist may assume, until the contrary may appear to him, that others using the highway, or about to use the highway, will exercise the care required of them under the circumstances.

If the jury finds that the plaintiff appeared on the roadway in such a manner as to constitute a confusing emergency, the driver of the vehicle, if proceeding with ordinary care, was not required to exercise the highest degree of care to avoid a collision, but only to exercise ordinary care. I instruct you that if Mr. Carlson, the truck driver, without any negligence on his part, was faced with a sudden peril or imminent danger to another, where immediate action was necessary, he would not be required to exercise all that presence of mind and care which is justly expected of an ordinary prudent man under ordinary circumstances.

The speed of any vehicle upon a highway not in excess of the limits specified by the California Vehicle Code or established as authorized in the

said code is lawful unless proved to be in violation of the basic rule declared in section 510 of the Vehicle Code, which has already been read to you. The prima facie speed limit outside a business or residential district, unless being posted to the contrary, is 55 miles per hour. In this connection you are instructed that the area where this accident occurred was not signposted for any speed limit at the time of the accident.

A driver of a motor vehicle is not required to sound a horn unless and until it reasonably appears necessary. When it is not reasonably necessary to insure the safe operation, the law requires that a horn shall not be used, but what may be reasonably necessary depends upon the circumstances of each particular situation. If you find the sounding of a horn would not have been heard above the noise of the train, or that the sounding of a horn would have made no difference in the happening of the accident, then you are instructed the failure, if any, to sound a horn, would not be a proximate cause of the accident.

In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be

upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a highway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway.

I instruct you that before you can return a verdict in favor of the plaintiff and against the Cement Company, you must first find by a preponderance of evidence that the defendant's employee, J. E. Carlson, was negligent, and that his negligence, if any, was the direct and proximate cause of the happening of the accident. In other words, you cannot return a verdict against the Cement Company, the defendant, unless you first find that there was no

contributory negligence and that some employee of that company was negligent, and that his negligence, if any, proximately caused the accident.

In connection with the defense of the defendant Cement Company, there is another issue which you must resolve in favor of the last mentioned defendant, or against it. In order for the plaintiff to recover in this court against the Cement Company, the burden of proof is upon him to show by a preponderance of evidence that at the time of the commencement of this action, on June 7, 1949, the plaintiff was a citizen of the State of Georgia and not of the State of California. This court is a court of limited jurisdiction. It has no jurisdiction over controversies between citizens of the same state. If the plaintiff in an action of the kind involved in this case between him and the Cement Company has failed to show you by a preponderance of the evidence that at the time of the commencement of the action he was a citizen of the State of Georgia, then your verdict must be in favor of the Cement Company. For purposes of federal jurisdiction, the term "citizen" means the same thing as "domicile." Plaintiff is a citizen of the state in which he was domiciled. Domicile consists of two elements: an act and an intent. Residence in a certain place with intent to remain there permanently. A person may temporarily change his abode from one state to another without the intention of remaining permanently in the latter state, but with the intent to return to his original residence. Under such cir-

cumstances the law does not regard his domicile as having been changed. On the other hand, if he changes the place of his abode to another state with intent to remain in the new residence, or forms such intent after he has changed his place of residence, then he ceases to be domiciled in the state from which he moved and is no longer a citizen thereof. Mere intention cannot effect a change of domicile. Nor is mere residence in a new state sufficient. But the intention to remain, coupled with the actual act of residence establishes the domicile, notwithstanding a floating intention to return to the former domicile at some future time. If a person has actually removed to another place with the intention of remaining there permanently, or for an indefinite time, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return to his former domicile at some indefinite future period. The mere fact that one is registered to vote in a certain place is not conclusive evidence upon the question of his domicile. Such a circumstances may be offset by other circumstances, such as, the said person is an unmarried man, unattached by domestic or family ties, is engaged in business or employment in a state other than that in which he is registered to vote, and has continued for several years in such state.

I will now come to the rules of law applicable to the other defendant, the Southern Pacific Company. As has already been stated to you, this is a suit, as far as the railroad company is concerned, under the

Federal Employers' Liability Act. We have in the State of California a law that applies only in the State of California, and that is the Workmen's Compensation Act. By that statute, irrespective of the negligence of an employer, every employee, if he is injured in the course of his employment, except because of his own misfeasance or misconduct, is entitled to compensation. He does not have to show under that statute that there was any fault on the part of his employer. The Federal Employers' Liability Act, however, applies all over the United States, wherever there is interstate commerce involved, which is the case here. And by this statute a right is given to an employee of a railroad company to recover in a court of the United States or of a state, damages, in the event that he has been injured in the course of his employment by any negligence on the part of his employer. And when I speak of negligence on the part of the employer, I mean the employer or any agent or employee of the employer, because in this case, a corporation or company can only act through agents or employees. And so if an employee suing under the Act shows negligence on the part of another employee of the company acting within the scope of his employment, it is the negligence of the employer or the corporation itself.

This Federal Employers' Liability statute, among other things, provides that a railroad carrier shall be liable in damages to an employee who suffers injury resulting in whole or in part from the negli-

gence of any officer, officers, agents or employees of the carrier, or by reason of any defect or deficiency due to such negligence in its cars, engines, appliances, machinery, tracks, roadbed, works or other equipment. Under this statute recovery can be made by the employee even if he himself has been guilty of some negligence, unless his negligence is the sole and only cause of the accident or injury which he suffered.

In a case of this sort the defendant Southern Pacific Company is entitled to rest its defense on the evidence introduced by the other party to the action, and to do so without itself calling any witness or introducing any evidence. And if it does so, you must not draw any inference unfavorable to the defendant Southern Pacific because it does not call witnesses or introduce evidence. All of the evidence in this case is available to the defendant Southern Pacific Company, and it is entitled to rely on the evidence introduced by other parties as fully as though it had introduced that evidence itself. And if that evidence shows no liability on its part, it will be your duty to return your verdict in accordance with that evidence; and if you so find, return a verdict in favor of the defendant railroad company.

Even if the plaintiff was injured at the time and place specified in his complaint and in the course of a switching operation, that alone does not entitle him to an award of damages. Even if he was so injured, he is not entitled to recover unless he

proved by a preponderance of the evidence all the factual elements necessary for recovery under the law, as I shall give and have given to you in these instructions. Plaintiff is not entitled to recover, even if he was injured while working on the job, merely because he was engaged in the course of employment at the time he was hurt. I have called your attention to the provisions of the Federal Employers' Liability Act dealing with responsibility of the employer for injuries to employees resulting in whole or in part from the negligence attributable to the employer. You must not be misled by this language in whole or in part. It does not mean that any negligence on the part of the employer, if there is any, however remote from the accident and injury complained of, is sufficient to impose liability upon the employer. To the contrary, before responsibility for negligence can be imputed to the employer, the plaintiff has the burden of proving that such negligence was more than a mere condition or remote cause of the injury complained of, and proving that it was the proximate cause of such injury.

Insofar as there is any question of care used by the Southern Pacific Company and its employees in the operation of the railroad here, they were not required to exercise the utmost degree of care which the human mind is capable of exercising. Nor were they required to exercise a greater degree of care than was required of any individual engaged in the same business. All that was required was the exer-

cise of ordinary care, such care as an ordinary prudent person would exercise, consistently with the practical operation of the railroad and in the same circumstances.

The person whose conduct we set up as a standard by which to measure the conduct of a defendant and its employees is not the extraordinary, cautious individual, nor the exceptionally skillful one; but simply a person of reasonable and ordinary prudence. The law does not demand of a defendant or of any of its employees exceptional or extraordinary or unusual skill or caution, but requires only ordinary care in operating its locomotives and trains along its tracks. Nor were they required to take steps against any unanticipated eventualities and happenings which were not reasonably to be foreseen.

If, however, there is any negligence on the part of the employee, and it is not the sole cause of the accident but is merely a contributing cause of the accident, the employee may still recover against his employer if he has shown that there was negligence on the part of the employer which proximately caused or contributed to his accident. In that event you will endeavor, if you so find, to determine the proportion of the contributory negligence of the employee, if any, and then you will deduct that percentage from the total amount of damages, if any, that you find the plaintiff is entitled to receive. That is the rule with respect to the railroad company. In other words, in the event

you find there was any contributory negligence on the part of the plaintiff in this action, then you cannot find the defendant Cement Company liable, but if you find there was any contributory negligence on the part of the plaintiff in this action, insofar as the railroad company is concerned, and if you find the railroad company was guilty of any negligence, then it is your duty to determine the proportion of the contributory negligence of the plaintiff, if any, and to deduct that percentage from the total amount of any damages, if any, which you find the plaintiff is entitled to, so far as the Southern Pacific Company is concerned. You should also bear in mind that under this law, the Federal Employers' Liability Act, the employee does not assume the risks of his employment. Simply stated, it means that there is no assumption of any risk under this law. So that it is not proper to withhold the judgment, holding the employer liable, if it appears that he is liable, because of any appearance or assumption of risk on the part of the employee.

The railroad company in this case was under a duty to exercise ordinary care, to furnish its employees with a reasonably safe place to work and reasonably safe methods of doing the work under the circumstances of the particular case. That means that here there was an obligation on the part of the railroad to furnish a reasonably safe place to work and a reasonably safe method of doing the work to its employees; and the plaintiff had a right to assume that the railroad company fulfilled

that obligation. I have told you that the plaintiff may only recover if by a preponderance of evidence he shows that by some negligent act of the employer, the Southern Pacific Company here, a reasonably safe place to work or a safe method of doing the work was not furnished, or that some negligence of some other employee or agent caused the injury. The mere fact, if it be a fact, that the railroad operations being carried on at that time and place the plaintiff was injured were accompanied by risks and hazards of injury to men working about there does not, of itself, show negligence on the part of the Southern Pacific Company. If the Southern Pacific Company exercised ordinary care in the conduct of its business and the operations in question, it was not negligence on its part to engage in and to continue such operations, exercising such care, even in the face of risks, hazards and dangers, if such there were, necessarily and unavoidably inherent in such operations so conducted. And if, as a result, and in such circumstances, and in the course of operations so conducted, an employee was injured as a result of such a risk, hazard or danger, responsibility for his injury cannot be imposed on the defendant Southern Pacific Company on that account. In other words, a railroad cannot be charged with or made liable for those injuries which result from the usual risks incidental to employment, which cannot be eliminated by the carrier's exercise of reasonable care. The mere fact, if it be a fact, that the plaintiff received an injury

while acting as a brakeman, creates no inference, presumption of any negligence, or fault on the part of the railroad company. If the plaintiff got off a railroad car in a place of safety and thereafter, without taking any care for his own safety, left that place and went to a place of danger on the highway, and if doing so, he was guilty of negligence which was the sole proximate cause of his injury, your verdict must be in favor of the defendant railroad company. If the plaintiff, Mr. Bellamy, went upon the highway in such circumstances that he could exercise ordinary care for his own protection, and by the exercise of such care could have protected himself from injury, and was injured because he did not do so, then it would not constitute negligence on the part of the Southern Pacific Company if it is reasonably assumed that plaintiff, by exercising ordinary care, could protect himself from all hazards, injuries and failures to provide some other person to look for approaching automobiles, to do those things which the plaintiff could and should have done for his own protection. It would not constitute negligence on the part of the Southern Pacific Company, and would not constitute proof that it had failed to provide a reasonably safe place to work.

If the employment of an employee of the Southern Pacific calls upon him to be upon a public highway temporarily for the purpose of crossing it or otherwise, that fact, as a matter of law, does not constitute negligence on the part of the em-

ployee or the Southern Pacific Company. If the defendant Southern Pacific Company was in the exercise of ordinary care, and so long as it exercised that care, it was entitled to assume that neither the plaintiff nor the Cement Company would be guilty of negligence; and until put on notice to the contrary, was entitled to act on that assumption. And if it did so, that did not constitute negligence or impose liability upon it. If, when the plaintiff was on the highway, he was in a place of danger, and if that was a place of danger only because a truck of the Cement Company was negligently operated along the highway, if you so find, and but for such negligence, if any, there would have been no danger, responsibility for such negligence of the defendant Cement Company, if any, cannot be imputed to the defendant railroad company. And if the defendant railroad company could not reasonably anticipate such negligence, if any, in the driving of the truck, its failure to do so cannot impose liability upon it. If, in all the circumstances of this case, the plaintiff was entitled to assume that he could go on the highway without being struck by an automobile or other motor vehicle, the defendant Southern Pacific Company was entitled to make the same assumption, since there was no evidence in this case that it had any notice or knowledge which the plaintiff did not have.

If the conductor in charge of the railroad movement at all times with which we are concerned was in plain sight of the railroad engine, if the con-

ductor were in a position to give any necessary signals to control the movement, then, even if the plaintiff Bellamy did not know this fact and because of that went out to the highway, that did not excuse the exercise of care by him; and if he was ignorant of the position of the conductor by the failure to exercise such care, responsibility for that cannot be imputed to the defendant railroad company. If the plaintiff Bellamy was experienced in and familiar with the work he was doing, and knew and appreciated normal risks and hazards which attended it, including chance of injury in some moving vehicles on the road adjacent to the railroad tracks, the defendant railroad company was not required to take steps to protect him against those risks and hazards as did not result from its negligence, which were normal and customary risks and hazards of the employment which were known to and appreciated by him, and which he himself could have avoided by the exercise of reasonable care for his own safety. The law presumes, and the defendant railroad company and its employees were entitled to presume and assume, according to the ordinary course of nature and the ordinary habits of life, that a person possessing normal faculties of sight and hearing would see and hear that which was in the range of his sight and hearing. The men conducting the railroad operation were also entitled to presume and assume, until put on notice to the contrary, if that is the fact, that any person who might be within the possible range of those opera-

tions was a person possessing normal faculties of sight and hearing.

If the plaintiff Bellamy was an experienced workman and could have done his work in safety by the exercise by him of that care which an ordinary prudent person would have used in the circumstance, then in the absence of such notice to the contrary, the defendant Southern Pacific Company was entitled to assume that he would use that care, that no injury would result to him as a result of his own conduct; and it was not necessary for it to do so, nor was the defendant Southern Pacific Company required to take special steps to warn or protect him from the result of his own act.

During all the time he was working, and at the time he was injured, the law imposed upon the plaintiff the duty to exercise reasonable care for his own safety. The defendant Southern Pacific Company owed him no duty to exercise a higher degree of care for his safety than he himself owed. He was required to exercise reasonable care to protect himself from injury from the ordinary hazards and dangers of his employment, not resulting from negligence, and to protect himself from injury from such hazards, however and whenever they might be encountered. There is nothing in any of the circumstances of this case which suspends that duty, which relieved him from performing it or excused a violation of it, if any. If the plaintiff Bellamy failed to perform the duty which the law imposed upon him, he was guilty of negligence.

You have been instructed as to the effect of contributory negligence on the part of Bellamy, and that if he was hurt as a proximate result of any negligence on the part of his employer, his contributory negligence as to it is not a complete defense, but is only a defense in the reduction and mitigation of damages. You must not be misled or confused by that instruction. It does not mean that negligence on Bellamy's part, if any, cannot be a complete defense in this action. To the contrary; if Bellamy was guilty of negligence and if that negligence was the sole proximate cause of injury to him, his negligence is a complete answer to this action and it will be your duty to return your verdict in favor of the defendant Southern Pacific Company.

Each defendant in this case is entitled to have its defense given separate and independent consideration. You may find in this case that one defendant was guilty of negligence which was the proximate cause of injury to the plaintiff, while the other was not; or that both of them were not. If you find that one was guilty of such negligence, your deliberations should not stop there, and you should not thoughtlessly conclude for that reason that a verdict should be rendered against both.

The defendant railroad, in engaging in railroad business and in operating a railroad, was engaged in a legitimate and lawful business, and in considering the claims made by the plaintiff, and in the suit here, you should bear in mind that the defend-

ant railroad company is entitled to the same consideration at your hands as any individual engaged in any other form of business. If you believe from the evidence and from the instructions of the court that one or the other of said defendants or both were not guilty of the negligence charged, then you have no right to compromise the question of liability of such defendant or defendants and award the plaintiff damages against such defendant or defendants, merely because he was injured on the occasion in question. If you believe either defendant was not negligent as charged in the complaint, then you will have no occasion to consider at all the question of damages insofar as such defendant is concerned. You must, if you so find, return a verdict against the plaintiff and in favor of such defendant.

In your consideration of this case, and in determining whether or not damages are to be given, you must not permit yourself to be influenced in the slightest degree by any emotion or feeling of charity or sympathy. Such feelings and emotions, however proper in themselves, have no just place in the consideration by you of this kind. In making your determination of the case, you cannot in any measure substitute prejudice or feelings of sympathy as a basis of an award. That is, for evidence as the basis of an award. Nor can you make a finding against the defendants, based upon mere guess, speculation, or conjecture. You must make your determination only upon the consideration of the

evidence before you and the instructions which have been given to you by this court.

In this case it is the duty of the jury first to ascertain whether or not there is any liability upon a defendant or either of them. The question of damages is not be considered for any purpose by the jurors in the jury room until they have first decided whether or not any defendant is liable. Damages can only be awarded if there is a liability on a defendant under the facts and under the law. Therefore, the jury is admonished to first consider and decide the question of liability. If that question is decided in favor of the defendant, the jury will have no further purpose or concern to deal with damages insofar as that defendant is concerned. If you find that the plaintiff did, on the day in question, suffer an injury or injuries proximately caused by the negligence of the defendants or either of them, then you are entitled to bring in a verdict in his favor as to such negligent defendant or defendants. If you decide that in favor of the plaintiff, then the next thing you are required to determine is as to what, if any, damages, plaintiff is entitled.

In cases of this sort it is customary for the complaint to allege an amount of damage claimed. There are such allegations here. These allegations are merely a claim; they are not in any sense evidence or proof, and are not to be taken by you in any sense as evidence or proof of what damages should be awarded if you award any damages. If

you award damages, the amount of damages you must resolve for yourselves under the instructions which I have given you, and which I will now give you, and upon the evidence which has been introduced.

If you find that the plaintiff is entitled to a verdict against either of the defendants or both of them, you should award as against such defendant or defendants such amount of damages that will reasonably compensate the plaintiff for all the detriment suffered by him, of which defendant's or defendants' negligence, if you find there was any such negligence, was the proximate cause; whether such detriment could have been anticipated or not.

In any instructions which I give you with respect to damages, I am not implying that you should give damages. I am giving you these instructions respecting damages only in the event that you should first determine that either defendant or both are liable. In estimating the amount of damages, you may consider the nature and the extent and the severity of his injury or injuries, if any, the extent and degree and character of the suffering, mental or physical, if any, its duration and its severity, if any, and you may consider the loss of time and the value thereof, and the loss of earning capacity of the plaintiff, if any. You may also consider whether the injury was temporary in its nature or permanent in its character. And from all those elements you can resolve what sum will fairly compensate the plaintiff for the injuries sustained, if you find

he sustained any injuries as a proximate result of the negligence on the part of such defendant or defendants. You may also consider as an element of damage the following: the reasonable value, not exceeding the cost to said plaintiff of the examinations, attention and care by physicians and surgeons, if any, reasonably certain to be required and to be given, and further treatments, if any, including in such care X-ray pictures reasonably necessary; the reasonable value not to exceed the cost to said plaintiff of the services of nurses, attendants, hospital accommodations and care, reasonably certain to be required and to be given in future treatments, if any. And in that connection I might say that as far as the past is concerned, there is no evidence of any cost to him for medical, hospital, nurses and X-rays. So what I have just told you deals with the future, not with the past. The reasonable value of the time lost by said plaintiff since his injury wherein he has been unable to pursue his occupation is another element you can consider.

In determining this amount, you should consider evidence of the plaintiff's earning capacity, his earnings and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled. The foregoing elements of damage specifically thus far mentioned in these instructions are elements which, if existent, can be proved by evidence. It follows, therefore, that your decision on such matters may not be arbi-

trary, but must be founded on the evidence before you.

You are instructed that with regard to pain and suffering, the law prescribes no definite measure of damages, but the law leaves such damages to be fixed by you as your discretion dictates and under all the circumstances may be reasonable and proper. It is not necessary, therefore, that any witness or witnesses should have expressed an opinion as to the amount of such damages for pain and suffering. The jury may make such estimate of the damages from the facts and circumstances in evidence by considering them in connection with their own knowledge and experience in the affairs of life.

If the plaintiff claims he will suffer in the future as a result of this accident, and if you return a verdict in favor of the plaintiff, then you cannot include any amount on account of such claimed future suffering unless the plaintiff has produced proof by a preponderance of the evidence that there is a reasonable certainty that he will suffer in the future. If you should find in favor of the plaintiff, then I instruct you that in fixing the damages, you may make allowance only for such elements that have been proved with reasonable certainty. Any claimed element of damage, past, present or future, as to which such uncertainty exists, must be eliminated from your considerations and must be eliminated as an element to be compensated for.

If you make an award in favor of the plaintiff, the only elements or matters for which you can make any allowance by way of compensation are those which are proximately caused by the accident. If damages are awarded, the only amount that you can award is such as reasonably to compensate for the detriment suffered. If damages are awarded, they must not in any event exceed what is reasonable. They must not be enlarged so as to constitute either a gift or windfall to the plaintiff, or punishment or penalty to the defendants or either of them. The only purpose of damages is to award reasonable compensation. There is no purpose here to inflict punishment or impose any penalty or make an award for the sake of example. If you should return a verdict in favor of the plaintiff, then in making the amount of recovery, you must bear in mind that a defendant is just as much entitled to your consideration as is the plaintiff. The defendant is entitled to protection at your hands against any unjust or unreasonable demand, and if you make any award in favor of the plaintiff, it will be your duty to see to it that such an award does not exceed what the plaintiff is in fact and in law entitled to recover.

I further instruct you that the burden of proof as to the amount of plaintiff's damages is upon the plaintiff, just as the burden of proof of every other affirmative allegation of plaintiff's complaint.

If, in making an award in favor of the plaintiff, you find that in the future there will be a loss of earning capacity, and make an allowance on that

account, then in giving consideration to that element, in making an award, you should consider the loss, if any, which the plaintiff has suffered by reason of loss of earning capacity. In this regard you should consider not the future earnings which the employer of the plaintiff would have paid, but only the loss to plaintiff, and which is based not upon the gross earnings the employer would pay but on the net amount which the plaintiff would have received, which means that deductions on account of income tax which the plaintiff would have been required to pay on earnings must be taken into consideration, so far as this element may enter into an award; and this for the reason that any reward which you make in this action on account of future detriment because of physical injury to the plaintiff himself is not subject to federal income tax.

It is the duty of you ladies and gentlemen of the jury to give uniform consideration to all the instructions I have given you and to consider the whole and every part thereof, together, and to accept such instructions as a correct statement of the law involved in this case. Ladies and gentlemen, if you can conscientiously do so, you are expected to agree upon a verdict. You should freely consult with one another in the jury room. If any of you should be convinced that your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under such circumstances. Upon the other hand, it is entirely proper for you to adhere to your own view if, after a full exchange of ideas, you still believe you are right.

If you find in favor of the plaintiff in this case, you should not, in arriving at the amount of your verdict, resort to the so-called "pooling plan" or scheme. That scheme is for each juror to write down the amount he or she thinks should be awarded, then add up the total and divide by twelve, and thus fix the amount of the verdict. Your verdict should be based upon the evidence and not upon chance.

I finally caution you that if it becomes necessary for the jury to communicate with the court during its deliberations, or upon its return to the court respecting any matter connected with the trial of this case, you should not indicate to the court in any manner how the jury stands numerically or otherwise on the issues submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict. Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous respecting each of the defendants. In other words, you must treat this case as if it were two separate actions, insofar as your verdict is concerned.

When you retire to the jury room to deliberate, you will select one of your number as your foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your spokesman in the further conduct of this cause.

Now I have here five forms of verdict, and in presenting these forms to you and telling you what they are, I am not suggesting in any manner what your verdict or verdicts should be. The first form of verdict, after eliminating the title of court and cause, reads as follows: "We the jury find in favor of the plaintiff and assess the damages against the defendants in the sum of blank dollars." That is to be used in the event that you bring in a verdict against both defendants.

The second form is: "We the jury find in favor of the plaintiff and against the defendant Southern Pacific and assess the damages against the defendant in the sum of blank dollars." That is to be used in the event that you find in favor of the plaintiff against the Southern Pacific and not against the Cement Company.

The third form is: "We the jury find in favor of the plaintiff and against the defendant Pacific Portland Cement Company and assess the damages against the defendant in the sum of blank dollars."

The fourth form is: "We the jury find in favor of the Southern Pacific Company." I might say in regard to that third form, that that is to be used in the event you find a verdict against the Pacific Portland Cement Company and in favor of the Southern Pacific Company.

Then I also have the form of verdict: "We the jury find in favor of the Southern Pacific Company." And in the event that you should find in the favor of the Southern Pacific Company, you

would sign that verdict. In the event you should find against the Cement Company, you would sign the previous verdict read to you, and vice versa as far as both the defendants are concerned.

The last verdict, the form of the verdict, is: "We the jury find in favor of the defendant Pacific Portland Cement Company."

Now are there any exceptions?

(During the deliberations of the jury, the following message was sent to the court by the foreman of the jury:)

"In the case of Bellamy vs. the Pacific Portland Cement Company, if negligence is shown by both the plaintiff and the driver, regardless of the amount, can a decision be reached in favor of the plaintiff?"

"Also, we would like to see the transcripts or statements of the accident by the crew members and driver Carlson."

(In reply thereto, the following answer was sent to the foreman of the jury by the court:)

"Your inquiry is as follows:

'In the case of Bellamy vs Pacific Portland Cement Company, if negligence is shown by both plaintiff and the driver, regardless of the amount, can a decision be reached in favor of the plaintiff?'

"The answer to this inquiry is: Insofar as the defendant Cement Company is concerned, if there was any negligence on the part of the plaintiff,

regardless of the degree thereof, which contributed to the accident, there can be no decision in favor of the plaintiff and against the Cement Company.

"You have asked for certain statements which are handed you herewith. As certain parts of said statements were ruled out of evidence, those parts have been deleted from these statements. The statements handed you are the statements of Quinlan made on the 27th of April, 1949, the statement of Edwards made on April 5, 1949, and the statement of Quinlan made on September 11, 1949.

"The statement of the driver Carlson was not put or read into evidence. The only part of this statement in evidence read as follows:

'I believe I noticed a man hanging on to the step of the boxcar. The next thing I realized was that I felt a bump. I immediately put on the brakes and stopped.'

"The statements of the remaining members of the railroad crew other than Edwards and Quinlan were not read in evidence or admitted in evidence and therefore are not available to you."

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, certify that the foregoing 43 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

ELDON N. RICH.

In the Southern Division of the United States District Court for the Northern District of California

No. 28,909-E

Before: Hon. Herbert W. Erskine,
Judge.

WILLIAM A. BELLAMY,

Plaintiff,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation; and PACIFIC PORTLAND CEMENT COMPANY, a Corporation,

Defendants.

EXCEPTIONS TO INSTRUCTIONS
REPORTER'S TRANSCRIPT

November 9, 1949

APPEARANCES:

For the Plaintiff
ROBERT HEPPERLE, ESQ.,
EDWARD M. DIGARDI, ESQ.

For the Defendants

Southern Pacific Co.
LOUIS L. PHELPS, ESQ.

Pacific Portland Cement Co.
LEIGHTON BLEDSOE, ESQ.

(A jury was duly impaneled and sworn, the respective parties presented their cases, argued to the jury and the Court instructed the jury upon the law; thereupon the following occurred.)

The Court: Now are there any exceptions? [2]

* * *

Mr. Bledsoe: Defendant Pacific Portland Cement Company respectfully excepts to the giving of the instructions on the workmen in the street rule, which is about the 39th instruction, [15] I think, that was given, on the ground that we take the position that rule does not apply, that there is no evidence to support it, and that the evidence shows that the rule does not apply in this case.

We also respectfully except, since the rule has been given, to the failure of the Court to give, under the separate request for instructions of this defendant, instruction No. 2, on the authority of Lewis vs. Southern California Edison Company, and instruction No. 3, under the authority of Milton vs. L. A. Motor Coach Company, and instruction No. 4, under the authority of Milton vs. L. A. Motor Coach Company, on the ground that those additional instructions contained additional elements that were not contained in the general charge of the Court on the issue of the workmen in the street rule, and that those additionl instructions would give the jury the opportunity of deciding whether the rule applied or not.

We also respectfully except to plaintiff's No. 7, on the ground that it does not take into account the possibility of contributory negligence, and simply says that if the two defendants are concurrently negligent, each of them is liable.

We except to plaintiff's instruction No. 24, which was given about the 14th instruction, I think, on the ground that it says that plaintiff does not have to prove his case beyond a reasonable doubt, which leaves the inference that if he proves it up to a reasonable doubt, is all he is required to prove. [16]

We except to the giving of plaintiff's instruction No. 18, on the ground that it imposes an absolute duty on the part of a motorist to keep his vehicle under control at all times, so as to avoid a collision with other persons; and on the further ground that it assumes something not in evidence. There is no evidence to support the fact that the driver of the automobile was not vigilant and did not anticipate the presence of others, and there is no evidence to support an assumption that the driver of the car did not see the plaintiff. Also on the further ground that the sceond to the last sentence on line 14 states the assumption that the plaintiff was lawfully using the highway.

We except to plaintiff's instruction 19, given by the Court, on the ground that it states that the defendant driver of the Cement Company had a duty to maintain a constant and vigilant lookout ahead for persons upon the highway, and there is no evidence to support the theory that he did not. The

evidence is to the contrary, that he did. And we register the further exception to it on the ground that lines 13 and 14 contain a statement to the effect, or an assumption to the effect, that the plaintiff was on the highway in the performance of his duties, and that he was required to be there in the performance of his duties. That is a statement of a fact which should be left to the determination of the jury. It also assumes that Mr. Carlson did not see the plaintiff, in the [17] last paragraph of that instruction, assumes such a fact, when there is no evidence to support it and there is evidence to the contrary.

That is all we have, your Honor.

Mr. Phelps: May the record show, your Honor, that as to defendant Southern Pacific Company, we may enlarge upon our exceptions. Plaintiff's instruction No. 7. And we also object to plaintiff's instructions No. 24 and, as well, No. 19, on the grounds as stated by Mr. Bledsoe, and rely upon those grounds additionally.

The Court: All right.

Mr. Bledsoe: So far as they are applicable to the Southern Pacific Company.

The Court: Well, I will adhere to the instructions as given.

Will you call the jury back now?

(Jury returned to the court room and resumed their positions in the jury box.)

The Court: Ladies and gentlemen, the marshal has the forms of verdict, and you are now directed to retire again to the jury room, and this time start your deliberations.

So, Mr. Linehan, would you take the jury to the jury room?

(Thereupon the jury retired to enter upon their deliberations.) [18]

CERTIFICATE OF REPORTER

I, Eldon N. Rich, Official Reporter, certify that the foregoing 18 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON N. RICH.

[Endorsed]: Filed January 26, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, or true and correct copy of an order entered on the minutes

of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the appellant, to wit:

Complaint for Damages

Answer of Defendant Pacific Portland Cement Company to Complaint

Answer of Southern Pacific Company

Verdict

Note to Jury

Plaintiff's Proposed Instructions

Instructions Requested by Defendants Pacific Portland Cement Company, Additional Instructions Requested by Defendant Pacific Portland Cement Company and Separate Request for Instructions by Pacific Portland Cement Company

Judgment on Verdicts

Notice of Motion for Judgment and of Motion for New Trial

Minute Order of November 30, 1949—Order Denying Defendant's Motions for Judgment Notwithstanding the Verdict, or For a New Trial

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit

Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal

Order Extending Time

Reporter's Transcripts:

Vol. 1—November 1, 1949—Testimony of William A. Bellamy

Vol. 2—November 2, 1949—Testimony of William A. Bellamy

Vol. 3.—November 2, 1949—Testimony of Frank G. Edwards

Vol. 4—November 9, 1950—Instructions to the Jury

Vol. 4—November 1, 2 & 7, 1949—Partial Reporter's Transcript

November 9, 1949—Exceptions to Instructions

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 27-A, 27-B, 27-C, 27-D, 27-E, 27-F, 27-G, 27-H, 28, 28-A, 28-B, 28-C, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43.

Defendants' Exhibits Nos. A, B, C, D, F, G, H, AA, BB, CC and DD.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 20th day of February, A.D. 1950.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12482. United States Court of Appeals for the Ninth Circuit. Pacific Portland Cement Company, a corporation, Appellant, vs. William A. Bellamy, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 20, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 12482

PACIFIC PORTLAND CEMENT COMPANY, a corporation,

Appellant,

vs.

WILLIAM A. BELLAMY, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant intends to rely on the following points:

1. The evidence was insufficient as a matter of law to establish negligence on the part of appellant or its servants.

2. Assuming (without conceding) that Appellant was negligent, Appellee was guilty of contributory negligence as a matter of law.

3. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 7.

4. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 24.

5. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 18.

6. The trial Court committed prejudicial error when it gave, over Appellant's objection, Plaintiff's (Appellee's) Requested Instruction No. 19.

7. The trial Court committed prejudicial error when it gave, over Appellant's objection, instructions to the effect that Appellee (plaintiff) was entitled to the benefit of the "workman in the street" rule.

8. The trial Court committed prejudicial error when, having, over Appellant's objection, instructed on the "workman in the street" rule, it refused, over Appellant's objection, to give Appellant's (defendant Pacific Portland Cement Company's) Separate Request for Instructions, and, particularly, No. 2, No. 3, and No. 4 of such Separate Request for Instructions.

9. The trial Court committed prejudicial error when, over Appellant's objection, it admitted in evidence Appellee's (plaintiff's) Exhibit No. 41, and permitted such exhibit to be read to the jury, in view of the fact that such evidence was incompetent, irrelevant, and immaterial.

/s/ LEIGHTON M. BLEDSOE,
(C)
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

Receipt of copy attached.

[Endorsed]: Filed February 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD DEEMED BY APPELLANT TO BE NECESSARY FOR CONSIDERATION OF THE APPEAL

Appellant designates, pursuant to Rule 19 of this Court, the following parts of the record deemed necessary for consideration of the appeal:

1. Complaint.

2. Answer of Appellant (defendant) Pacific Portland Cement Company to Complaint.

3. Answer of defendant Southern Pacific Company to Complaint.

4. All evidence received during the trial, including the testimony of all witnesses, all stipulations or admissions of counsel, all writings and other exhibits received and read in evidence, all motions and applications made during the trial and the rulings thereon, subject to the exceptions noted under paragraph 10, infra.

5. The verdict of the Jury and Judgment entered thereon.

6. Motion of Appellant (defendant Pacific Portland Cement Company) for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial.

7. Minute order denying said motion.

8. Instructions given by the Court.

9. The following instructions proposed by Appellant (defendant Pacific Portland Cement Company) and, over Appellant's objections, refused by the Trial Court:

Appellant's (defendant Pacific Portland Cement Company's) "Separate Request for Instructions" consisting of title page and numbered pages 1, 2, and 3.

10. The following instructions given at request of Appellee (plaintiff) and objected to by Appellant:

Appellee's (plaintiff's) requested instruction number 7;

Appellee's (plaintiff's) requested instruction number 24;

Appellee's (plaintiff's) requested instruction number 18;

Appellee's (plaintiff's) requested instruction number 19.

(It is suggested that in printing the transcript on appeal, it will be unnecessary to print separately Appellee's said requested instructions, and that it will be sufficient if the printer designate in that portion of the record embodying the trial Court's instructions that the instructions referred to, respectively, were given at the request of Appellee; to this end, Appellant here designates the portions of the Reporter's Transcript entitled "Instructions to the Jury" which embody Appellee's requested instructions numbered 7, 24, 18 and 19:

Appellee's requested instruction No. 7, "Instructions to the Jury" page 7, lines 17 to 22, inclusive;

Appellee's requested instruction No. 24, "Instructions to the Jury" page 8, lines 13 to 20 inclusive;

Appellee's requested instruction No. 18, "Instructions to the Jury," page 10, lines 12 to 24, inclusive;

Appellee's requested instruction No. 19, "Instructions to the Jury," page 10, line 25, to page 11, line 20, inclusive.)

11. Reporter's Transcript, except as indicated herein:

(a) Volume 1, except as follows:

Page 31, line 10, to and including page 41, line 2;

Page 51, line 17, to and including page 53, line 8.

(b) Volume 2, except as follows:

Page 74c, line 18, to and including page 78, line 12;

Page 105, line 20, to and including page 107, line 16.

(c) Volume 3 (print in its entirety).

(d) Volume 4, except as follows:

Page 75, line 3, to and including page 102A, line 2;

Page 196, line 23, to and including page 199, line 14;

Page 348, line 1, to and including page 352, line 12;

Page 353, line 16, to and including page 365, line 23.

(e) Instructions to the Jury (print in its entirety).

(f) Exceptions to Instructions, except as follows:

Page 2, line 2, to and including page 15, line 22.

12. Notice of Appeal to United States Court of Appeals for the Ninth Circuit.

13. Designation of the Portions of the Record,

Proceedings and Evidence to be Contained in the Record on Appeal.

14. Designation of Parts of Record Deemed by the Appellant to be Necessary for Consideration of the Appeal.

15. All other records required by the provisions of Rule 75(g), Federal Rules of Civil Procedure.

/s/ LEIGHTON M. BLEDSOE,
(C)
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

Receipt of copy attached.

[Endorsed]: Filed February 24, 1950.

[Title of Court of Appeals and Cause.]

DESIGNATION OF SEQUENCE IN WHICH VOLUME AND PAGES OF REPORTER'S TRANSCRIPT SHOULD BE PRINTED

Noting that the volumes and pages, respectively, of the Reporter's Transcript are not in correct chronological sequence, Appellant herewith designates the order in which the respective volumes and pages of the Reporter's Transcript should be printed to the end that the printed record will show such sequence with reference to the parts of the record deemed necessary for consideration of the appeal and heretofore so designated:

Volume 1: 1:1 to 31:9 (indicating page 1, line 1, to page 31, line 9, inclusive), 41:3 to 51:16, 53:9 to 74:13.

Volume 2: 74-A:1 to 74-C:17, 78:13 to 105:19, 107:16 to 122:16.

Volume 4: 75:1 to 75:4, 157:1 to 170:15.

Volume 3: 123:1 to 136-A:6.

Volume 4: 185:1 to 196:22, 199:15 to 347:16, 352:13 to 353:16, 365:21 to 365:23.

Instructions to the Jury: Print in its entirety.

Exceptions to Instructions: Print the following portion: 2:1 to 2:1 (one line), 15:23 to 18:24.

/s/ LEIGHTON M. BLEDSOE,
(C)
DANA, BLEDSOE & SMITH,
Attorneys for Appellant.

[Endorsed]: Filed March 1, 1950.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD DEEMED NECESSARY FOR CONSIDERATION OF THE APPEAL

Appellee designates, pursuant to Rule 19 of this Court, the following additional parts of the record deemed necessary for consideration of the appeal:

Reporter's Transcript Volume I, p. 31, line 10, to p. 38, line 9, inclusive; and Volume IV, p. 75, line 3, to p. 99, line 25, inclusive.

Dated: San Francisco, March 6, 1950.

/s/ HERBERT O. HEPPERLE,
Attorney for Appellee
William A. Bellamy.

Receipt of copy acknowledged.

[Endorsed]: Filed March 6, 1950.

No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY (a corporation),
Appellant,

vs.

WILLIAM A. BELLAMY,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 12,482

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Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

I. STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION.

This is an appeal by Pacific Portland Cement Company, a corporation, defendant in the court below, from a final judgment against it in favor of appellee, William A. Bellamy, based upon a verdict against appellant in the amount of $15,000.00. The jury returned a verdict in favor of co-defendant Southern Pacific Company (Tr. 18, 19). The action was for personal injuries allegedly sustained by appellee on April 4, 1949, on a highway east of Redwood City,

California (Tr. 2-7); jurisdiction of the trial court was, as to defendant Southern Pacific Company, based on the Federal Employers' Liability Act (45 U.S.C.A. Sec. 51 *et seq.*), and, as to appellant, on diversity of citizenship (28 U.S. Code Sec. 1332); the jurisdiction of this court is based on Title 28, U.S. Code, Sec. 1291.

The complaint (Tr. 2-7) was in two counts and alleged that the action was brought under the provisions of the Federal Employers Liability Act (45 U.S. C.A. Sec. 51, *et seq.*); it was alleged, as to the defendant Southern Pacific Company, that at the time and place of the accident the Company had negligently operated a train on which appellee was riding as a crew member and had negligently failed to protect appellee against being injured by motor vehicles using a highway paralleling the tracks at the point of the accident; as to appellant Pacific Portland Cement Company, it was alleged that on said highway appellant, through its servant, negligently operated a motor vehicle with which appellee came in contact. In a second cause of action based on the same facts, diversity of citizenship was alleged between appellee and appellant (Tr. 7).

The answer of appellant (Tr. 8-13) denied negligence and pleaded contributory negligence; the answer of Southern Pacific Company (Tr. 13-17) denied negligence and pleaded (1) contributory negligence; (2) sole negligence of the plaintiff as the proximate cause, and (3) sole negligence of appellant as the proximate cause.

At the close of the plaintiff's case, appellant and Southern Pacific Company both moved for a dismissal (Tr. 267-271), and thereafter appellant and the Southern Pacific Company moved for a directed verdict in their favor before the jury retired (Tr. 348-349).

The jury returned a verdict in favor of appellee and against appellant in the amount of $15,000.00; the verdict exonerated the Southern Pacific Company (Tr. 18-19).

Thereafter, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, appellant filed motions for judgment notwithstanding the verdict and, in the alternative, for a new trial (Tr. 24-32). Both motions were denied (Tr. 33). Thereafter appellant filed notice of appeal to this court (Tr. 34); plaintiff did not appeal from the judgment in favor of the Southern Pacific Company.

II. STATEMENT OF QUESTIONS INVOLVED.

(a) Was not the evidence insufficient as a matter of law to establish negligence on the part of appellant or its servant?

(b) Did not the evidence establish as a matter of law that appellee was guilty of contributory negligence?

(c) Was it not error for the court in its instructions to give appellee the benefit of the "workmen in the street" rule?

(d) Having given appellee the benefit of the "workmen in the street" rule, was it not error for the trial court to refuse appellant's proposed instruction that the rule had no application if the jury should find that appellee suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle?

(e) Having given appellee the benefit of the "workmen in the street" rule, was it not error for the trial court to refuse appellant's proposed instruction that the rule does not apply to the pedestrian "who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity?

(f) Was it not error for the trial court to instruct the jury that appellee was "lawfully using" the highway where the character of appellee's use of the highway was a question of fact to be decided by the jury?

(g) Was it not error for the trial court (in giving plaintiff's proposed instruction No. 19) to assume the existence of facts not in evidence or with respect to which there was a conflict in the evidence?

III. SPECIFICATIONS OF ERROR.

1. The District Court erred in refusing to grant judgment for appellant notwithstanding the verdict, as the evidence was insufficient as a matter of law to establish negligence on the part of appellant or its servant.

2. The District Court erred in refusing to grant judgment for appellant notwithstanding the verdict, as the undisputed evidence showed that appellee was guilty of contributory negligence as a matter of law.

3. The District Court erred in instructing the jury that appellee was entitled to the benefit of the "workmen in the street" rule; more particularly, the District Court erred in instructing the jury as follows (Tr. 365-366):

> "In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a highway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean

> that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway."

The grounds of the objections urged at the trial were that the rule was inapplicable to the facts of the case, that there was no evidence to support it, and that the evidence showed that the rule was inapplicable in the case (Tr. 392).

4. The District Court erred in refusing to instruct the jury in accordance with appellant's Separate Request for Instruction No. 2, which said proposed instruction read as follows (Tr. 20-21):

> "If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway."

Appellant objected (Tr. 392) to the Court's refusal to give said instruction on the grounds that the refusal to give the same violated the rule laid down in *Lewis v. Southern California Edison Co.,* 116 Cal. App. 44 (1931).

5. The District Court erred in refusing to instruct the jury in accordance with appellant's Separate Request for Instruction No. 3, which read as follows (Tr. 21):

> "You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity."

Appellant objected to the court's refusal to give said instruction on the grounds that the refusal to give the same violated the rule laid down in

> *Milton v. L. A. Motor Coach Co.* (1942), 53 Cal. App. (2d) 566.

6. The District Court erred in instructing the jury that appellee was "lawfully using" the highway where the accident occurred; more particularly, the District Court erred in giving appellee's (plaintiff's) proposed Instruction No. 18 (Tr. 22-23), reading as follows (Tr. 359):

> "It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time

and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent."

Appellant objected (Tr. 393) to the giving of said instruction on the ground that the same imposes an absolute duty on the part of a motorist to keep his vehicle under control at all times so as to avoid a collision with other persons, and on the further ground that the same assumed facts not in evidence, and on the further ground that there was no evidence to support the fact that the driver of the automobile was not vigilant and did not anticipate the presence of others, and on the further ground that there was no evidence to support the assumption that the driver of the vehicle did not see appellee, and on the further ground that the instruction assumed that appellee was "lawfully using" the highway.

7. The District Court erred in giving appellee's (plaintiff's) proposed Instruction No. 19 (Tr. 23-24), reading as follows (Tr. 359-360):

"You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing 'No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed which endangers the safety of persons or property.' Under this statute it was one of the duties of the Cement Company's driver in the exercise

> of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff *is* [in] such a position."

Appellant objected to the giving of said instruction on the ground (Tr. 393-394) that there was no evidence to support the theory that appellant's driver had failed to comply with his duty to maintain a constant and vigilant lookout ahead for persons upon the highway, and on the further ground that the instruction assumes that appellee was on the highway in the performance of his duties, and that he was required to be there in the performance of such duties, and that such assumption was a statement of fact which should have been left to the determination of the jury; and on the further ground that the instruction assumed that appellant's driver did not see appellee when there was no evidence to support such assumption and there was, in fact, evidence to the contrary.

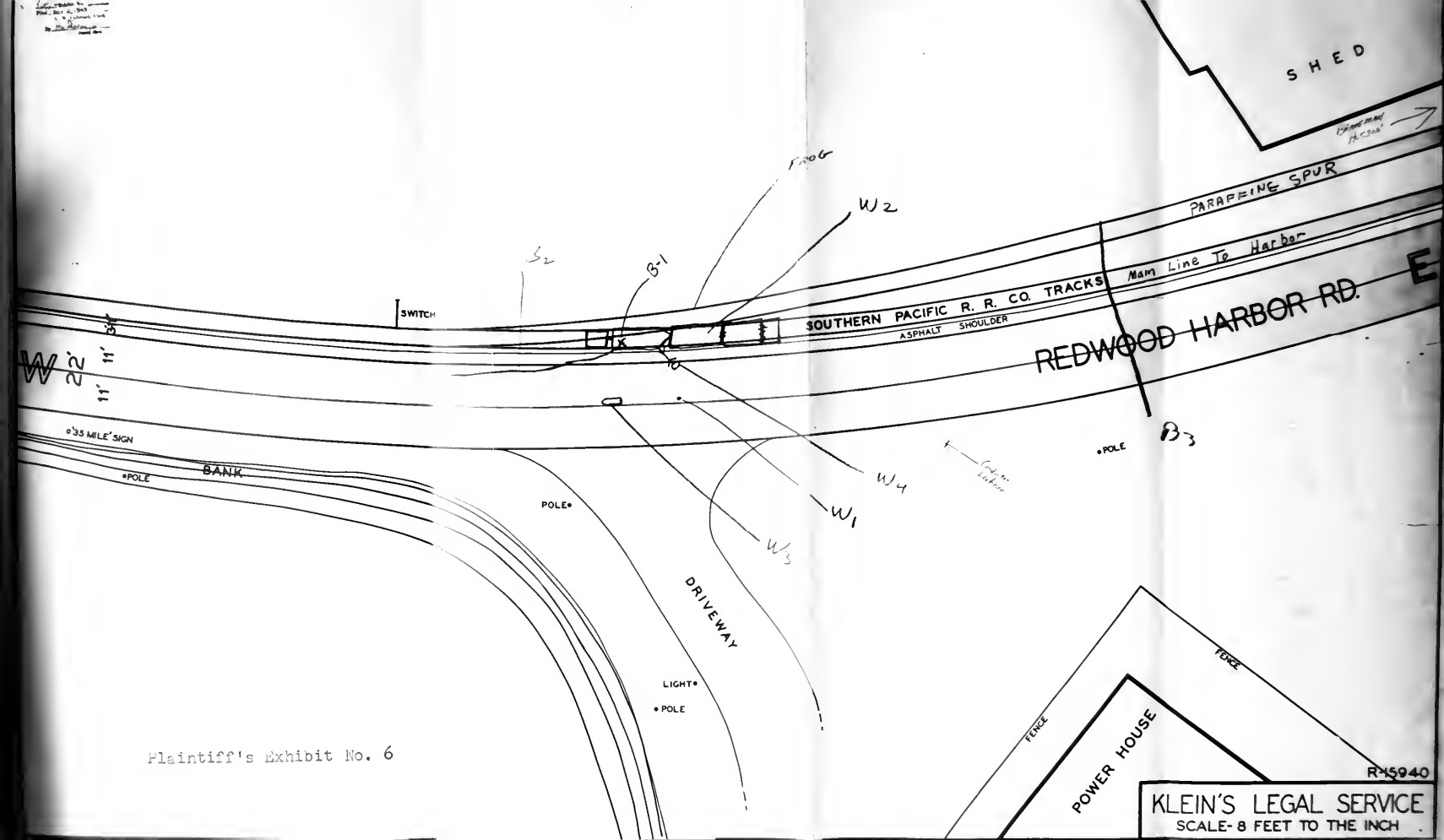
IV. STATEMENT OF FACTS.

On April 4, 1949, appellee, William A. Bellamy, was in the employ of the Southern Pacific Railroad Company (one of the co-defendants in the court below), and on that day reported for duty at the Bayshore railroad yards of the Southern Pacific Company in San Francisco at about 3:30 in the afternoon (Tr. 46). Bellamy was a brakeman at the time of the accident hereinafter described (Tr. 45).

After reporting for duty in San Francisco, Bellamy boarded a local freight train bound for Redwood City. The train departed from the Bayshore yards and went south to Redwood City, where certain train movements not involved in this accident were accomplished (Tr. 46-47).

The train crew, in addition to appellee, included Lechner, conductor, Husson and Quinlan, brakemen, and Edwards, engineer. The name of the fireman was unknown to Bellamy (Tr. 47).

The scene of the accident is shown in plaintiff's exhibit No. 6, which is a chart indicating, roughly, the following physical situation: from the main line of the Southern Pacific Company at Redwood City, a spur track leads off in a general easterly direction. This line, or spur, intersects the Bayshore Highway east of Redwood City and then goes on in an easterly direction toward the waterfront area to the east of Redwood City. Near the scene of the accident this spur track curves slightly to the north. A paved highway, approximately 24 feet in width, in-



Plaintiff's Exhibit No. 6

cluding shoulders, parallels the spur immediately to the south. A subsidiary spur track to the Pabco (or "paraffeine") plant leads off to the northeast from the main spur track. The train involved in the accident consisted of a locomotive with one or two cars coupled on ahead of it and one or two cars coupled on to the rear of it. The "pilot", or cow-catcher of the locomotive was at all times headed to the east.

It was the intention of the train crew to run the train in to the Pabco plant, pick up a car or two, and then to come back onto the main spur, dispose of one of the cars, and then go back in on the "Pabco" spur and leave one of the cars at the Pabco plant (Tr. 50-51).

Prior to the accident, the train had already proceeded into the "Pabco" properties, which were only a short distance from the switch point connecting the main spur and subsidiary spur referred to above, and had commenced to move back toward the switch point. The engineer (Edwards) was in the engineer's position on the southerly side of the engine, next to the highway, and Bellamy was riding on the car immediately ahead of the engine, on the first step of the ladder on the southerly side of the car, at the end nearest the engine (Tr. 52).

The train was moving in a westerly direction, at 2 to 3 miles per hour (Tr. 93), at a point where the tracks were close and, roughly, parallel to the highway, when Bellamy jumped off the train (Ptf. Ex. No. 6, mark B-1), dashed out into the highway

without looking up the highway to the east (Tr. 98 and 189), and came in contact with the right rear fender of appellant's pick-up truck (Tr. 190), which was passing west-bound in about the center of the highway at the moment of impact (Tr. 328); Bellamy did not see the vehicle before coming into contact with it (Tr. 52-56; 100-101). Edwards, an eyewitness, estimated the speed of the vehicle at 30 miles per hour at the moment of impact (Tr. 175). Officer Whitmore, who investigated the accident, testified that the vehicle came to rest about 30 feet west of the point of impact (Tr. 281).

Bellamy testified that after jumping from the train he ran out into the highway (Tr. 98) with his back to the east (Tr. 54), running in a southwesterly direction (Tr. 112).

Edwards testified that after Bellamy jumped from the train "he was sort of sidestepping toward the center of the road" (Tr. 188) and that "he was backing against the current of traffic, backing into the road" (Tr. 189).

Both Edwards (Tr. 189) and Bellamy (Tr. 98) testified that *after jumping off the train Bellamy did not look up the highway to the east, and there was no contrary testimony.* The vehicle with which Bellamy came into contact had approached from the east.

Carlson, driver of appellant's vehicle, testified that he approached the scene in about the center lane of the highway, that he saw Bellamy "hanging on the box car" (Tr. 328) and that as he was about opposite

Bellamy he "got a glimpse out of the corner of my eye of him letting loose, and then I felt a bump, and I came to an immediate stop" (Tr. 329).

Edwards testified (Tr. 175) that Carlson "swerved to the south side of the road to try to prevent hitting Mr. Bellamy, and the rear end, the rear fender, caught Mr. Bellamy in the back."

Bellamy testified that he had jumped off the train for the reason that he was unable to see both the engineer and the men at the rear end of the movement, from whom he apparently was required to pass signals to the engineer (Tr. 60-61). It was Bellamy's "own choice" to conduct himself as he did at the time and place of the accident (Tr. 209-211).

Bellamy testified that he was well aware of the fact that the harbor road paralleled the spur track at the point of the accident, that he knew the road was heavily traveled, and that passing cars could be expected from either direction (Tr. 83).

Although some of the exhibits show a sign indicating a 35-mile speed limit on the highway at the scene of the accident, this sign was placed on the highway after the accident occurred (Tr. 74); the *prima facie* speed limit on the harbor road at the time and place of the accident was 55 miles per hour (Tr. 284).

A short time before Bellamy dropped off the train, he had been looking to the east watching the crew at the rear end of the movement, but before leaving the train had turned around and faced west before he

dropped off (Tr. 91). He apparently had to step over one rail of the main spur before he got onto the highway and he testified that he ran out into the highway and ran diagonally forward in the same direction as the movement of the train.

Bellamy's testimony as to his movements after he stepped off of the moving train is as follows (Tr. 97-99):

"Q. When you stepped down, you say you stepped between the rails, just about midway, center between the rails, the center line of the track about, approximately?

A. The best I remember, I just stepped down near the outside rail, the nearest rail on the highway.

Q. How far from the nearest rail?

A. I would say near the rail.

Q. Well, how far is near? I am sorry.

A. Well——

Q. The best you can, please. A foot or two?

A. I would say six inches or a foot, somewhere; just to be safe in missing the rail—a foot.

Q. Then you stepped over that rail?

A. That is the best of my remembrance.

Q. And then ran forward in the direction whence the engine was going and diagonally, is that right?

A. That is right.

Q. Out into the highway?

A. Yes.

Q. About how many steps did you take from the time you first stepped down until the time you were hit?

A. It would be pretty hard to say. Ten, fifteen steps.

Q. About ten or fifteen normally running-walking steps?

A. Maybe twenty.

Q. Fifteen or twenty steps?

A. Yes.

Q. Sort of a running motion, was it, Mr. Bellamy?

A. I would call it a running motion.

Q. You would call it running. Then from the time you stepped off of the car until the time you were hit, did you ever turn around to see whether there was anything coming from behind you?

A. Not after I hit the highway, no, sir, I hadn't time to turn around.

Q. I am not asking you that question; I am asking you if you looked, turned around and looked at all at any time not only after you hit the highway, but while you were still in a place of safety in between those two rails on the main line track. Did you turn and look then?

A. Yes, sir, I turned around.

Q. After you detrained, after you got off?

A. Not after I left the train.

Q. You didn't look around in the direction from which this truck was coming at any time after you got off?

A. Not after, no, sir, after.

Q. Indeed at any time after you changed your position on the side of the car from looking towards the crew to looking towards the engineer, is that right?

A. That is right."

Bellamy testified that he dropped off of the train at Point B-1 on plaintiff's exhibit 6 (Tr. 111), and admitted that from that point he *"broke into a run and ran in a southwesterly direction diagonally out into the highway"* (Tr. 112). He was running at the time the impact occurred (Tr. 112). As stated by Bellamy, "it was a running movement; it wasn't a natural walk" (Tr. 113).

To summarize the foregoing: a small train of cars was backing out of the subsidiary spur from the "Pabco" plant. It was the intention of the members of the crew to bring the train out onto the main spur. A highway leading from Redwood City to the harbor area paralleled the spurs at the point of impact and was in very close proximity to them. The plaintiff was a brakeman member of the crew operating the train and was thoroughly familiar with the physical surroundings and with the fact that a heavily traveled highway paralleled the tracks; immediately before the accident, as the train was proceeding westerly at a speed of from two to three miles per hour, appellee was riding on the southwest corner of the car immediately in front of, or to the east of, the locomotive, next to the highway. He glanced toward the engineer of the train, jumped off of the car on which he was riding, stepped into the highway without looking towards the east, from which direction appellant's vehicle approached, and ran in a westerly or southwesterly direction out into the center of the highway, where he came into contact with the right rear fender of appellant's vehicle. At the moment of impact the

vehicle was headed in a westerly direction and was proceeding (according to the testimony of the engineer, an eyewitness to the accident) at a speed of about 30 miles per hour.

It was not denied that from the moment plaintiff jumped from the train until the moment of impact he at no time looked up the highway to his left but, on the contrary, proceeded on the run out into the stream of traffic without looking out for vehicles approaching from the east, and that he came into contact with the right rear fender of just such a vehicle.

V. ARGUMENT.

A. THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH NEGLIGENCE ON THE PART OF APPELLANT OR ITS SERVANT.

We have outlined above the facts involved in the accident out of which the appellee's injuries arose. At the time of the accident appellant's servant, according to the undisputed testimony, was driving appellant's vehicle in a westerly direction in about the center of the highway which paralleled the railway tracks on which a train was moving two or three miles an hour in a westerly direction; appellee jumped off the train to the ground, took a couple of steps towards the highway, and, *without looking in the direction from which traffic was to be anticipated,* ran out into the highway with his back to oncoming traffic and ran into the right rear fender of appellant's passing vehicle (Tr. 97-99, 112, 189).

The testimony is also undisputed that appellant's servant, driver of the car, observed appellee in his position on the freight car and caught a glimpse of appellee as he jumped off the freight car; that immediately afterwards appellant's servant felt a bump on his car, stopped, and discovered that appellee had come in contact with his right rear fender. (Tr. 328-329.)

It is also undisputed that the *prima facie* speed limit on the highway at the time and place of the accident was 55 m.p.h. (Tr. 284.) It is also undisputed that appellee's crossing of the highway, or attempt to cross it, took place at a point which was neither a marked cross-walk or at an intersection. (Ptf. Ex. 6.)

The highest speed attributed to appellant's vehicle by the only eyewitness other than appellant's servant was 30 m.p.h. at the moment of impact. Appellant's servant placed a lower speed in his testimony, but we assume for the purpose of this argument that the 30-mile estimate given by the witness Edwards is controlling.

It is the general rule that "no man can be expected to guard against events which are not reasonably to be anticipated, or are so unlikely that the risk would commonly be disregarded". *(Prosser on Torts*, p. 221.)

The driver of a vehicle lawfully moving on a highway cannot be held to anticipate that a pedestrian will suddenly abandon his position of safety at the side of a highway, dash out into the highway, and

run into the right rear fender of such vehicle. Accordingly, under the rule that no man can be held liable for failing to anticipate that which, as a matter of law, cannot be reasonably anticipated, appellant's servant was not bound (we submit) to anticipate the extraordinary turn of events which resulted in appellee's injuries.

In *Schooley v. Fresno Traction Company* (1922), 56 Cal. App. 705, in which judgment for plaintiff was reversed, it was held as a matter of law that the operator of a streetcar "could not be charged with a duty to anticipate that anyone would suddenly step from a place of safety onto the car tracks in the middle of a block, directly in front of an approaching streetcar".*

The court in the cited case stated "the person in charge of a car with a clear track before him has a right to assume that people will not suddenly undertake to cross in front of it", quoting from *Driscoll v. Market Street etc. Co.,* 97 Cal. 553.

A similar holding appears in *Depons v. Ariss* (1920), 182 Cal. 485, in which judgment for the defendant was affirmed. The trial court's decision was based upon the fact that plaintiff had failed to establish negligence on the part of the defendants, since it appeared that the deceased had stepped in front of a moving vehicle. The court said "It was shown that deceased left a position of safety and put himself di-

*The rule is the same whether a streetcar or an automobile is involved. See *Wing v. Kishi* (1928), 92 Cal. App. 495.

rectly in the path of an approaching truck. This evidence was sufficient to support the conclusion of the trial court. Under these circumstances no duty was imposed upon the driver of the truck to assume that the deceased would suddenly expose himself to imminent peril. On the contrary, he had a right to conclude that he would not recklessly move directly in front of the approaching machine."

In the instant case, it is true that had appellant's servant not been on the highway at the time and place of the accident, the accident would not have occurred. This fact, of course, does not serve to constitute negligence on the part of appellant's servant. He was driving along the highway, as he had a right under the law to do, and, under the authorities above set out, was not bound to anticipate that appellee—in a position of safety when observed by appellant's servant—would suddenly abandon his position of safety and dart out into the stream of traffic.

It follows that the evidence was insufficient, as a matter of law, to establish any negligence whatsoever on the part of appellant's driver.

B. EVEN ASSUMING (WITHOUT CONCEDING) THAT APPELLANT'S SERVANT WAS NEGLIGENT IN OPERATING APPELLANT'S VEHICLE, THE UNDISPUTED TESTIMONY ESTABLISHES, AS A MATTER OF LAW, THAT APPELLEE WAS GUILTY OF CONTRIBUTORY NEGLIGENCE WHEN HE ABANDONED A POSITION OF SAFETY AT THE SIDE OF THE HIGHWAY AND, WITHOUT LOOKING, RAN INTO THE STREAM OF TRAFFIC, WITH HIS BACK TOWARDS APPROACHING VEHICLES, AND CAME IN CONTACT WITH THE RIGHT REAR FENDER OF APPELLANT'S PASSING VEHICLE.

We are aware that appellate courts do not weigh conflicts in evidence of negligence. However, where, as here, the evidence is undisputed and may be said to "point unerringly" (*Anthony v. Hobbie* (1945), 25 Cal. (2d) 814 at 818) to the conclusion that plaintiff's conduct constituted negligence as a matter of law, the judgment is without support in the evidence and is erroneous.

We would not be raising this point if there were a conflict in the evidence on the question of whether or not appellee looked before he ran into the stream of traffic on the highway. He himself swears that he did not look and that, on the contrary, after he dropped off the train he ran out into the highway with his back to westbound traffic (Tr. 97-99). Edwards, also an eyewitness, confirms appellee's sworn testimony that he did not look in the direction of approaching traffic before he went out into the highway with his back towards such traffic, and that it was a westbound vehicle with which appellee came in contact (Tr. 189).

That a pedestrian "who crosses a well-lighted thoroughfare other than on a crosswalk, in a diagonal line and with his back partly turned to approaching traffic and is struck by a car approaching from the quarter from which traffic was to be expected" is guilty of negligence as a matter of law was held in *Mundy v. Marshall* (1937), 8 Cal. (2d) 294. The court said that under the facts of the case "the trial court was justified in concluding that the decedent was contributorily negligent as a matter of law and was correct in taking the case from the jury".

Numerous cases are in accord.

In *Chase v. Thomas* (1935), 7 Cal. App. (2d) 440, judgment for the plaintiff was reversed where it appeared that plaintiff had stepped from a place of safety and, without looking, had walked into the highway where defendant's vehicle struck him. The court stated: "Plaintiff had no right to assume that drivers of such vehicles would slow down in order to give way to him. He was under the positive duty, under the provisions of the statute, to yield the right of way to others. He violated this statutory provision. Instead of allowing the automobile to pass in front of him he stepped directly in front of it. The driver of the car was afforded no opportunity to stop after plaintiff stepped into the way. These acts upon plaintiff's part, being a violation of the provisions of the statute in that plaintiff instead of yielding the right of way claimed it for himself, constituted negligence *per se*" (7 Cal. App. (2d) 443).

The court went on to state that "Had he not violated the law or had he used ordinary care for his own safety, the accident would not have happened. His negligence therefore bars recovery" (7 Cal. App. (2d) 444).

The duty of pedestrians, before crossing a street, to look in the direction from which traffic may be expected is not fulfilled by looking once and then looking away, but on the contrary is "a continuing duty and was not met by looking once and then looking away," as stated in *Deike v. East Bay, etc. Co.* (1935), 7 Cal. App. (2d) 544, 550. In the case referred to it appeared that the plaintiff, without looking, had gone from a place of safety out into the pathway of an oncoming streetcar. The court stated that "his conduct amounted to contributory negligence as a matter of law".

In connection with the case last above cited, we point out that there is no evidence whatsoever that appellee in the instant case at any time looked in the direction of approaching traffic after he abandoned his position of safety on the side of the train.

The fact that a few moments previously he had been looking to the east, watching his fellow-crewmen, cannot be claimed to have fulfilled his duty to look again before dashing out into the highway. The testimony is without conflict that appellee's view to the eastward was obscured by reason of the fact that the accident happened at about the apex of a curve. He had been looking to the east—he does not say that he

had looked into the highway—a few moments before the accident, but before dropping off the train he had turned around and was looking to the west toward the engineer. He then dropped off the train onto the ground and, without again looking in the direction of oncoming traffic, dashed out into the highway, in a "running" movement, with his back to oncoming traffic, and came into contact with the right rear fender of a vehicle which was going in the same direction in which appellee was running.

That appellee's conduct under such circumstances constituted contributory negligence as a matter of law appears to be well established by numerous California cases which have had occasion to pass upon similar conduct.

In *Brkljaca v. Ross* (1923), 60 Cal. App. 431, the court stated:

> "Had the plaintiff thus looked, as he was in duty bound to do, he must have seen the lights of the defendant's approaching car and been aware of its approach. He cannot, therefore, be heard to excuse himself for proceeding across the center line of the said avenue and into the space about to be rightfully traversed by said approaching car, upon the plea that he was not aware of its approach. His act in so doing was, therefore, upon the undisputed facts of the case, negligence as a matter of law."

In *Casey v. Delelio* (1940), 39 Cal. App. (2d) 91, a judgment for the plaintiff was reversed. The court noted that by the undisputed evidence "the plaintiff

was shown to have run into the place of danger without looking for traffic," (39 Cal. App. (2d) at 93). In reversing the judgment, the court stated:

> "As long as the doctrine of contributory negligence as a matter of law is to be recognized it must be applied to a case such as this where the undisputed evidence shows that plaintiff voluntarily placed himself in a position where he could not see danger approaching from a point where a reasonable man must have anticipated it."

In *Flores v. Los Angeles Railway Corp.* (1936), 15 Cal. App. (2d) 576, a judgment for the defendant, based upon a directed verdict, was affirmed when it appeared that the plaintiff had failed to look "at any time after leaving the curb until she arrived at the streetcar track". The court held that her failure to look constituted "contributory negligence as a matter of law" (15 Cal. App. (2d) 580).

In *Horton v. Stoll* (1935), 3 Cal. App. 687, a judgment of nonsuit was affirmed on appeal where it appeared by the undisputed testimony that the plaintiff walked out into the street at a place other than a cross-walk, having apparently failed to look for "approaching cars in the directions from which they would come" (3 Cal. App. (2d) 690).

See also the following cases:

Mayer v. Anderson (1918), 36 Cal. App. 740 (judgment of nonsuit affirmed where the plaintiff, in attempting to cross a street, failed to look, and walked into a passing vehicle);

Ogden v. Lee (1923), 61 Cal. App. 493 (judgment of nonsuit affirmed where it appeared that plaintiff had walked out into the street after pulling his umbrella down over his head and thus obscuring his vision of approaching traffic);

Atkins v. Bouchet (1923), 65 Cal. App. 94 (another "umbrella" case, in which the court reversed a judgment for plaintiff on the ground that plaintiff was guilty of contributory negligence as a matter of law. The court pointed out that "plaintiff did not know of the presence of the automobile on the street until it struck her");

Chrissinger v. Southern Pacific Company (1915), 169 Cal. 619 (judgment of nonsuit affirmed where it appeared that plaintiff had, without looking, walked in front of a passing train);

Gibb v. Cleave (1936), 12 Cal. App. (2d) 468 (judgment for plaintiff reversed where it appeared that plaintiff walked out into the street when "a single glance to the front or to the left would have shown" the approaching danger; the court also observed that "a pedestrian does not exercise reasonable care by taking just one look before placing himself in the midst of oncoming traffic upon a public highway" (12 Cal. App. (2d) 471));

Klusman v. Pacific Electric Ry. Co. (1923), 190 Cal. 441 (nonsuit affirmed where it appeared that plaintiff had failed to look in both directions before stepping upon the tracks);

Finkle v. Tate (1921), 55 Cal. App. 425 (directed verdict for defendants affirmed where it appeared that plaintiff had attempted to cross the street "with his vision obstructed").

We repeat that had there been any evidence whatsoever that appellee looked in the direction of approaching traffic after he dropped off the train and before he started out into the highway, we would not argue that his conduct was negligent as a matter of law, but, in the light of the foregoing authorities, and the undisputed testimony, we submit that in the instant case appellee was guilty of negligence as a matter of law and that such negligence was manifestly a proximate cause of his injuries, since, had he looked, he could have seen and avoided the impact with the right rear fender of appellant's passing vehicle.

C. AS THE "WORKMEN IN THE STREET" RULE HAS NO APPLICATION WHERE THE WORKMAN SUDDENLY ABANDONS A PLACE OF SAFETY AND, WITHOUT LOOKING, DASHES INTO THE PATH OF DANGER, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN, OVER APPELLANT'S OBJECTION, IT INSTRUCTED THE JURY THAT APPELLEE WAS ENTITLED TO THE BENEFIT OF THE RULE.

The trial court instructed the jury as follows (Tr. 365-366):

> "In this connection plaintiff claims he was a workman on the highway, and that his duties required him to take the position on a highway where he was when the accident befell him. If you find from the evidence that the plaintiff was required by his duties to be upon the highway at

the time he was injured, then I instruct you that the standard of care required of him was that required of a reasonably prudent person whose duties required him to be upon the highway; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions and would approach with their cars under reasonable control. In other words, persons who are required by their work to be on a higthway are not considered legally in the same light as ordinary pedestrians, because they are engaged in an occupation which requires them to be on the highway, the degree of care required of them is less than that required of an ordinary pedestrian. But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway."

Appellant duly excepted to the giving of the instruction (Tr. 392).

It is a well recognized rule that "the laborer in the street is required to use a lesser quantum of care than a pedestrian". *Scott v. San Francisco* (1949), 91 C.A. (2d) 887.

That rule, however, has no application where (as in the instant case) the person claiming its benefit

suddenly abandons a place of safety and steps into the pathway of danger.

Thus, in *Lewis v. Southern California Edison Company* (1931), 116 Cal. App. 44, a swamper on a garbage truck, whose duties at least a part of the time required him to work in the street, jumped down off the truck into the path of a vehicle which was approaching, without warning, at 30 miles per hour. A new trial was granted after a verdict for the plaintiff, who, on appeal, relied upon the "workmen in the street" rule. In holding that the rule was not applicable, the court stated:

> "We believe such rules do not apply if the workman, as in this case indicated, without notice, suddenly jumps from the left running-board of the garbage truck in front of the approaching car."

A review of the cases in which courts have approved a "lesser quantum of care" for workmen in the street than for ordinary pedestrians shows that the rule has been applied to the normal case of a man, already at work in the street, who cannot be expected to interrupt his work with constant efforts to ascertain whether anyone is about to run him down, in view "of the necessity of his giving attention to his work" (*Hedding v. Pearson* (1946), 76 C.A. (2d) 481).

Thus, in *Jones v. Hedges* (1932), 123 Cal. App. 742, the deceased was struck by a car while helping to apply tar to a highway, and was working in smoke

which obscured approaching traffic from his view. Held, rule applicable.

In *Mecham v. Crump* (1934), 137 Cal. App. 200, plaintiff, a road foreman, whose duties required his presence on the highway, stooped over in the highway to pick up a key used in one of the vehicles under his command. He was struck while stooping over. Held, rule applicable.

In *Porter v. Rasmussen* (1932), 127 Cal. App. 405, plaintiff was cutting a hole in the street with an "air gun" when a vehicle struck him from the rear. Held, rule applicable.

We have searched in vain for any case which holds that a litigant is entitled to the benefit of the rule where (as in the instant case) he suddenly projects himself from a place of safety into the pathway of danger. The *Lewis* case, supra, holds the rule inapplicable under such circumstances.

See also *Warnke v. Griffith Co.* (1933), 133 C.A. 481, where the court declined to apply the rule when the workman chose a perilous course of conduct when a safer one was available to him.

The analogy to the instant case is clear: Bellamy had the choice, after dropping off the train, of (i) momentarily glancing in the direction from which traffic might be expected, or (ii) running blindly out into the stream of traffic without looking. There was no evidence whatsoever that his duties required him to run blindly into the street with his back to approaching traffic. Having of his own free will elected

the perilous alternative, he was not entitled to the benefit of the rule.

In *Kenna v. Central Pacific R. R. Co.* (1894), 101 Cal. 26, judgment of nonsuit was affirmed. It appeared that the decedent's duties required him to be in the vicinity of a railroad track, that he stepped onto the track and walked with his back to an approaching locomotive, which struck and killed him. Said the court at p. 29:

> "The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting from a neglect of this rule. Walking upon the line of a railroad where trains are at any time liable to pass is itself dangerous, and to do so without looking to see whether a train is approaching is negligence *per se.*"

None of the cases dealing with the "workmen in the street" rule purport to exculpate the workman from the duty to use ordinary care; they merely exact a lower quantum of care; we submit that, as a matter of law, a workman who dashes from a place of safety into the path of an approaching danger, without looking, has not observed even a minimum standard of care.

Had Bellamy already gained the center of the highway and been (perhaps) walking towards the west giving signals, etc. it might be argued that he would at such time be entitled to the benefit of the rule. That was not the case, however, here, because the undisputed evidence showed that Bellamy jumped off

the train and, without looking, *ran* out into the center of the highway where he came in contact with the right rear fender of appellant's passing vehicle.

D. IN REFUSING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE "WORKMEN IN THE STREET" RULE HAD NO APPLICATION IF THE JURY SHOULD FIND THAT APPELLEE "SUDDENLY LEFT A PLACE OF SAFETY WITHOUT NOTICE AND PROCEEDED INTO THE PATH OF THE APPROACHING VEHICLE", THE TRIAL COURT COMMITTED PREJUDICIAL ERROR.

It was the contention of appellant (as stated under point C, supra) that the "workmen in the street" rule was inapplicable in the circumstances of this case.

Nevertheless, when the trial court gave an instruction based on the rule, appellant proposed the following qualifying instruction (Separate Request for Instructions No. 2 (Tr. 20-21)):

> "If you find that the plaintiff in this case suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle, you are instructed that the rule of law governing workmen in the street or road has no application to such circumstances and your decision should be governed by the general rules of law read to you by the Court concerning the duties and obligations of the ordinary pedestrian who is using a street or roadway."

Appellant duly excepted to the trial court's refusal to give the proposed qualifying instruction (Tr. 392).

The qualifying instruction proposed by us authorized the jury, if it found in accordance with the language of the instruction, to apply the general rules of law governing ordinary pedestrians.

That the "workmen in the street" rule does not apply to an individual who "suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle" was held in *Lewis v. Southern California Edison Co.* (1931), 116 Cal. App. 44, which we have discussed under point C, supra.

It is submitted that the court's failure to give the proposed qualifying instruction created in the jury the impression that the "workmen in the street" rule applied even though the jury were to believe from the evidence (and the evidence [Tr. 97-99] was without conflict on the point) that Bellamy "suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle."

For the reasons above stated, it is clear, we submit, that the court's refusal to grant our proposed instruction was prejudicial error.

E. IN REFUSING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE "WORKMEN IN THE STREET" RULE DOES NOT APPLY TO THE PEDESTRIAN "WHO MAY ONLY OCCASIONALLY USE THE STREET OR ROAD IN THE PURSUIT OF HIS OCCUPATION IF SUCH OCCASIONAL USE ON HIS PART IS A MATTER OF CHOICE AND NOT A MATTER OF NECESSITY", THE TRIAL COURT COMMITTED PREJUDICIAL ERROR.

Appellant requested the following instruction (Separate Request for Instructions No. 3, Tr. p. 21):

> "You are instructed that the rule of law that demands less vigilance of a workman in the street does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity."

Appellant duly excepted (Tr. 392) to the trial court's refusal to give the proposed instruction.

It was our theory of the case that the most that could be said for Bellamy's actions at the time of the accident was that his duties did not *necessarily* require his presence in the middle of the heavily travelled highway. As pointed out by Edwards (Tr. 209-211), it was Bellamy's "own choice" to go into the highway. There could be no denying that it was his own choice to run blindly into the highway from a place of safety without looking and with his back to approaching traffic.

That the "workmen in the street" rule does not apply to the pedestrian who may only occasionally use the street or road in the pursuit of his occupation if such occasional use on his part is a matter of choice and not a matter of necessity is established in *Milton v. L. A. Motor Coach Co.* (1942), 53 C.A. (2d) 566.

In the *Milton* case, a photographer was injured while taking photographs in the street. The court held, in reversing judgment for the plaintiff, that the "workmen in the street" rule "cannot be extended to protect photographers or others who may occasionally use the streets in the pursuit of their occupation if

they do so from choice and not from necessity" (53 C.A. (2d) 573), citing *Carlsen v. Diehl* (1922), 57 C.A. 731, 737).

Whether appellee, at the time of his injuries, was *required* to be where he was, or whether he was of the class of worker described in the *Milton* case, was a question of fact for the jury, and the jury should have been properly advised as to the law applicable to both alternatives, rather than solely as to the law applicable to the alternative more favorable to appellee.

In addition to appellant's proposed separate request for Instructions No. 3 above quoted, appellant also tendered the following proposed instruction (appellant's separate request for Instruction No. 4, Tr. 21):

> "If you find that the plaintiff was not forced to be or to remain in the place where he was injured on the roadway as a matter of duty, although he may have had a right to be there, and that his use of the roadway in the manner in which he used it at the time and place in question was a matter of choice and not a matter of necessity, then you are instructed that the plaintiff is not to be classed with laborers engaged in street work, and was, under such circumstances, required to exercise the ordinary care that is required of the ordinary pedestrian under such circumstances."

Appellant duly excepted to the trial court's refusal to give the proposed instruction (Tr. 392).

We do not separately argue the court's error in refusing to give appellant's proposed Separate Re-

quest No. 4, since the same reasons support our claim of error with respect to Separate Request No. 4 as do those in support of our claim of error with respect to the court's refusal to grant our Separate Request for Instructions No. 3, supra.

The error of the court in refusing to give our Separate Request for Instructions No. 3 was further accentuated by language which appeared in Plaintiff's Proposed Instruction No. 19 (Tr. 23-24), which the court gave (Tr. 359-360), and to the giving of which appellant excepted (Tr. 393).

We refer to the court's instruction (Tr. 359) that "it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and *particularly those the performance of whose duties require them to be thereon*" (Tr. 359-360).

The recital referred to, in effect, described appellee as one of a class "whose duties require them to be" on the highway. Whether appellee's duties required him to be on the highway was, again, a question of fact for the jury, and the court erred in assuming, in view of the conflicting evidence, that appellee's status as a "workman in the street" had been established as a matter of law.

F. IN INSTRUCTING THE JURY THAT APPELLEE WAS "LAWFULLY USING" THE HIGHWAY, THE COURT INVADED THE PROVINCE OF THE JURY, IN VIEW OF THE FACT THAT THERE WAS SUBSTANTIAL EVIDENCE WHICH, IF BELIEVED, WOULD HAVE ESTABLISHED THAT APPELLEE WAS NOT LAWFULLY USING THE HIGHWAY.

Appellee proposed (Plaintiff's Instruction No. 18, Tr. 22), and the court gave (Tr. 359), the following instruction:

> "It is part of the duty of the operator of an automobile to keep his machine always under control, so as to avoid collisions with other persons lawfully using the public highway. He has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the defendant Cement Company's driver in the operation of the automobile he was driving. And if you believe from the evidence that at the time and immediately before the collision in question, he did not keep the automobile under control, so as to avoid colliding with the plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent."

Appellant duly excepted to the giving of the instruction (Tr. 393).

At the outset, it is to be noted that the trial court, by use of the words "he [referring to the operator of the automobile] has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and must anticipate and expect the presence of others," inferred that appellant's driver

erroneously assumed that the road was clear, that he was not vigilant, and that he had failed to anticipate or expect the presence of others. There was no evidence anywhere in the record to support such an inference, and that portion of the instructions was therefore obviously erroneous. Carlson's testimony was otherwise (Tr. 322-343). He actually saw appellee on the train and saw him jump off the train.

Quite apart from this objection, in the last sentence of the instruction it will be noted that the court described appellee as *"lawfully using said highway."*

The general rule governing pedestrians using a highway is set out in Section 564 of the Vehicle Code on which the court instructed the jury (Tr. 362). It is quite true that workmen in the street are not compelled strictly to comply with the provisions of Section 564. See *Zumwalt v. Tryon* (1932), 126 C.A. at 583.

Violation of Section 564 of the Vehicle Code constitutes, as to an ordinary pedestrian, however, negligence *per se*. *Scalf v. Eicher* (1935), 11 C.A. (2d) 44.

Whether appellee's status was the same as that of an ordinary pedestrian or whether his duties required his presence in the middle of the highway was a question of fact for the jury. When the court characterized appellee as "lawfully using said highway" it, in effect, instructed the jury that, irrespective of any conflict in the testimony (and there was conflict [Tr. 209-211] as to whether appellee was required by his

duties to run out into the highway as he did), appellee was exempt from the requirements of Section 564 of the Vehicle Code. Since the only person in any way exempt from the provisions of Section 564 is a person whose duties *require* his presence in the highway, the court, when it characterized appellee as "lawfully using the highway", took from the jury the question of whether appellee's duties required his presence in the highway, and of whether, even assuming the "workmen in the street" rule applied, his conduct was lawful.

It is unnecessary to cite authority for the proposition that an instruction which takes from the jury a question of fact is prejudicially erroneous.

G. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING PLAINTIFF'S PROPOSED INSTRUCTION NO. 19 FOR THE REASON THAT SUCH INSTRUCTION ASSUMED THE EXISTENCE OF FACTS NOT IN EVIDENCE OR WITH RESPECT TO WHICH THERE WAS A CONFLICT IN THE EVIDENCE.

Appellee proposed (Plaintiff's Instruction No. 19, Tr. pp. 23-24) and the court gave (Tr. 359-360) the following instruction:

> "You are instructed that at the time of the accident there was in effect section 510 of the California Motor Vehicle Code, providing "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for the traffic on and the surface and width of the highway; and at no event at a speed

which endangers the safety of persons or property.' Under this statute it was one of the duties of the Cement Company's driver in the exercise of reasonable care to maintain a constant and vigilant lookout ahead for persons upon the highway, and particularly those the performance of whose duties require them to be thereon. If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver, in the exercise of reasonable care, could have discovered his presence, but failed to do so, then and in that event the said driver was negligent. And in this connection you are instructed that the law will not permit one to say that he looked and did not see what was in plain sight; for to look is to see, and in such circumstances, you must necessarily find that the defendant's driver either failed to look, or having looked, did see the plaintiff in such a position."

Appellant duly excepted to the giving of the instruction (Tr. 393-394).

As can be seen from the language contained in the foregoing instruction, the court characterized appellant's driver as either one who "could have discovered" appellee's presence on the highway but "failed to do so", or as one who "looked and did not see" appellee.

There was no evidence whatsoever that appellant's driver failed to discover appellee's presence on the highway or that he looked and did not see. He nowhere made the contention that he had failed to see

appellee. On the contrary, he testified (Tr. pp. 326-329) that he observed appellee riding on the freight car and that "as I got by this man hanging on the boxcar, I just got a glimpse out of the corner of my eye of him letting loose and then I felt a bump, and I came to an immediate stop".

The testimony of appellee that he dropped off the car and ran out into the highway (Tr. pp. 97-99) without looking in no way controverts Carlson's testimony that he in fact did see appellee.

Since the instruction is couched in language suggesting that appellant's driver failed to see appellee in the highway and since there is no evidence whatsoever to support a claim that appellant's driver failed to see appellee in the highway, the instruction is subject to the vice that it assumes facts with respect to which there is either no evidence whatsoever, or at least a conflict of evidence, and is therefore erroneous, since it invades the province of the jury. *Clark v. Volpa Bros.* (1942), 51 Cal. App. (2d) 173, Syl. Para. 3.

The instruction is also erroneous in referring to appellant's driver as being one of a class "the performance of whose duties require them to be" on the highway. Whether appellee's duties required him to be on the highway was a question of fact for the jury and the court's assumption of such fact improperly invaded the province of the jury and constituted error. *(Clark v. Volpa Bros.,* supra.)

VI. CONCLUSION.

In conclusion, it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, California,
May 1, 1950.

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No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
Appellant,

vs.

WILLIAM A. BELLAMY,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

The parties will be designated as they were in the trial court, except that all reference to the defendant (unless otherwise indicated) will be to the defendant Pacific Portland Cement Company, the appellant. All references to pages are, unless otherwise indicated, to the pages of the transcript of record.

I. STATEMENT OF THE CASE.

The case attempted to be presented by appellant in its brief and its "Statement of Facts" is not the one which was tried and submitted to the jury.

In so far as the brief purports to deal with determinative facts, it rests either upon mere assertion or upon mere portions of the testimony necessarily considered and rejected by the jury. It fails to recognize or apply the elementary rule that the evidence will be interpreted in the light most favorable to the plaintiff and that the jury returned a verdict in favor of the plaintiff and against the defendant rather than against the plaintiff and in favor of the defendant.[1] It proceeds upon the assumption that plaintiff was bound by the testimony of defendant's witnesses, particularly its driver. It overlooks the fact that the jury was entitled to rest its verdict upon the evidence as a whole, including such testimony of defendant's witnesses as was favorable to him[2] and even upon evidence contrary to the testimony of plaintiff himself.[3] By such methods the appellant achieves a false and misleading "Statement of Facts" and upon such predicate seeks to bind appellee by inapplicable propositions of law.

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[1] *Southern Pacific Co. v. Souza* (9 Cir. 1950) 179 F. 2d 691;
Everett v. Southern Pacific Co. (9 Cir. 1950) 181 F. 2d 58;
Primm v. Market St. Ry. Co. (1943) 56 Cal. App. 2d 480, 132 P. 2d 842;
Gamer v. New York Life Ins. Co. (9 Cir. 1935) 76 F. 2d 543.

[2] *Ford Motor Co. v. Pearson* (9 Cir. 1930) 40 F. 2d 858, 864-865:
"In determining whether this question was properly submitted to the jury, an appellate court in the case of a disagreement between the testimony of witnesses, where the case is properly one for the consideration of a jury to be determined by their judgment as to the truth or falsity of the testimony, must assume that they disbelieved the witnesses whose testimony conflicts with their conclusion, and believed the witnesses whose testimony would support the verdict."

[3] *Primm v. Market St. Ry. Co.* (1943) 56 Cal. App. 2d 480, 132 P. 2d 842;
Gibson v. Mendocino County (1940) 16 Cal. 2d 80, 105 P. 2d 105;
Parker v. Manchester Hotel Co. (1939) 29 Cal. App. 2d 446, 85 P. 2d 152.

Equally misleading and equally unhelpful are the claims of error presented by this appeal. The fact is that the case was tried under rulings by the court and submitted to the jury under instructions more favorable to the appellant than to which it was entitled. This, we think, will become patent as we review the record.

A simple statement of the ultimate facts, which the jury was entitled to find, is the following:

Defendant's driver, Joseph E. Carlson, in broad daylight, with the weather clear and his view unobstructed from the time he rounded the curve to the east more than 1,000 feet away, ran down the plaintiff giving train signals with arms outstretched, on the highway in front of him. Carlson knew that plaintiff and trainmen like him, by reason of the proximity of the highway and the tracks, would, in carrying out their duties as freight trainmen, be required to be in the highway in front of him. He had known this for more than eighteen years.

He either actually saw plaintiff in the highway and ran him down, or, without looking, but knowing he would be there, nevertheless ran him down. He did this in either case, without warning signal, without slowing his vehicle, and without taking any steps to avoid striking plaintiff.

Since these facts, if the jury had the right to find them, are decisive of all propositions raised by the defendant, we shall set out the testimony establishing them either by references to the transcript page, or by the testimony itself.

At the time of the accident it was broad daylight with the weather clear. Plaintiff's witness, Locomotive Engineer Frank G. Edwards, testified, "And what was the

condition at that time in respect to visibility? A. It was broad daylight. Q. And as to visibility, was it good or bad [or] otherwise? A. Very good, clear'' (176-177).

The physical situation at the place of the accident is shown by photographs (Plff. Exh. No. 19), made a part of this brief. A plat, a photostatic copy of which appears in appellant's brief between pages 10 and 11, was used for purposes of illustration. The overhang of the freight cars beyond the nearest rail and into the highway is shown by a photograph (Plff. Exh. No. 31).

From these exhibits and the testimony it appears that the Redwood Harbor Road, on which the accident occurred, lying west to east, parallels the adjoining spur track to the north. As characterized by appellant ''Near the scene of the accident this spur track curves slightly to the north.'' The overhang of the freight cars over the ends of the ties is such that a trainman working that side of the train would necessarily drop off upon the highway itself (Plff. Exh. No. 38).

Plaintiff testified, ''The road comes up to the track—it is a road all the way up to the track'' (61).

Defendant's witness, Brakeman Joseph Quinlan, testified, ''It is very hard to say just how he stepped, how much is dirt, because the road, it tapers off from macadam to dirt and it is more or less traveled on right close to the tie ends'' (304-305).

As defendant's driver Carlson left his employer's premises to the east and was traveling in a westerly direction on the north side of the highway, a cut of freight cars was being moved by plaintiff's train crew on this track.

The train movement was a back-up movement, that is, the engine was in reverse position backing from the east to west with three cars ahead of it and one or two cars behind it (51, 171, 250). The locomotive engineer was in his position on the right side of the cab next to the highway (87, 171).

Plaintiff, as this movement was being made, was riding on the side of the car immediately ahead of the engine and on the first step of the ladder at the end nearest the engine (52).

Plaintiff was required to be in this position. He testified, "My job was to work between the engineer and the crew, work between them" (52). And, "My duties [at that time were] to look for signals and after the cut of cars passed over the switch, to line the switch for the movement" (53). "I was required to look out for signals in case some should be passed from the rear end" (124). "It was my duty" "to pass signals to the engineer to stop the train after it had cleared the switch" (124).

Plaintiff was required, as the movement was being completed, to keep in sight of the engineer and control the movement by passing signals to the engineer. In order to do this he was required to drop off the moving cut of cars and take a position upon the highway.

Engineer Edwards, testified, "The man following the engine is usually supposed to keep in sight of the engine during the movement" (209). And, "The man following the engine usually tries to keep in sight of the engineer at all times" (210). And, "Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times? A. The head

brakeman tries to keep in view of the engineer at all times'' (219-220).

Engineer Edwards testified, ''Mr. Edwards, will you state whether or not, based upon your experience and the rules of the company, the position taken by Mr. Bellamy immediately prior to the accident, while he was giving you this continuous signal, was a proper position? A. It was'' (205).

Plaintiff's witness, George P. Lechner, the conductor, testified, ''Mr. Lechner, based on your 14 years' experience as a railroad man, based on the rules of the company, based on the custom and practice, under the circumstances and movements involved at the time of the accident, state whether or not you, as head brakeman, would have dropped off the train in the vicinity of the frog and taken a position in the highway where you could see the engineer and the men at the rear of the cut and pass signals? * * * A. Well, yes'' (258-259).

Plaintiff, as the train cleared the switch, dropped off of the moving cut of cars onto the ground approximately at the point marked B-1 on the plat (53). Plaintiff testified, ''I dropped off the car and was facing the engineer, I went over into the highway, I had been there only a short while when I was struck down by the car, whatever hit me'' (55). And again, ''Could you give your best estimate as to how far away you were from the side of the train at the time you were struck? A. Approximately six, seven feet—six, seven, eight feet, six feet'' (55).

Engineer Frank G. Edwards testified, ''Will you state whether or not he [plaintiff] left the car in the regular manner? A. Yes'' (173).

Plaintiff, after stepping out into the road, was in the act of giving the engineer a continuous back-up signal. Frank G. Edwards testified, "Did you see what he did after he left the car? Mr. Bellamy? A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). Testifying further, "Will you tell us what that signal was? A. It is a back-up signal. Q. Will you stand and demonstrate how that signal was given? A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing. Q. Was that a continuous signal or otherwise? A. It was a continuous signal. Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was" (202).

It was in this situation that defendant's driver Carlson, rounding the curve from the east toward the west, came upon the plaintiff and ran him down.

The physical facts which the jury was entitled to consider show that Carlson was more than 1,000 feet from plaintiff when he rounded the curve.

The lowest speed of the train, as plaintiff was keeping up with it after dropping off, given in the evidence, was 2 miles per hour.

The plaintiff testified, "As the car was moving, about how fast was it going, Mr. Bellamy? A. Just a very slow rate of speed; it would be hard to estimate. Q. Can you give us an estimate? A. Oh, two, three, four miles —from two to—two or three miles an hour" (93).

Plaintiff kept pace with the train. He testified "I was moving approximately the same distance the train was moving, so I wasn't very far from the engine, to what I had been riding on that box car" (112).

The highest number of steps taken by plaintiff from the time he dropped off to the time he was struck was 20 steps of approximately 3 feet a stride. He testified, "15, 20 steps; it would be hard to judge how many steps I did take. Q. And your stride is about three feet a stride, is it, running or walking? A. Hardly that far, I guess. In the neighborhood of three feet, yes, sir. Hardly so far" (112).

At the 2 miles per hour, which the train and plaintiff were moving, plaintiff traveled 3 feet per second. Twenty steps at 3 feet each equals 60 feet. Sixty feet divided by 3 feet per second gives 20 seconds which plaintiff used in traveling the 60 feet.

The highest speed of the truck was 35 miles per hour. George P. Lechner testified, "Did you estimate its speed? * * * I would say between 30 and 35 miles an hour" (234). At 35 miles per hour, the truck was moving 51-plus feet per second. Twenty seconds, the time used by plaintiff in taking the 20 steps, times 51-plus feet per second equals 1,020 feet, the distance the truck traveled while plaintiff was traveling the 20 steps.

Making due allowance for the fact, though the jury could use its own judgment in the matter, for the approximate character of both, and reducing the mathematical results by 50 per cent, the speed of movement of plaintiff and the truck, as well as the number of steps taken, still leaves plaintiff walking forward on the high-

way while the truck driver, with plaintiff in his unobstructed view, was traveling a distance of over 500 feet.

Carlson knew, and had known for more than eighteen years, that train movements of this kind would be made at that hour of the day, in the manner and in the circumstances of this one. He knew, and had known, that plaintiff, or trainmen with similar duties, was required to ride the cut of cars, to descend therefrom to the roadway and give signals to the engineer just as plaintiff did.

Carlson testified that for more than eighteen years he had been employed at the same plant of this defendant at Redwood City Harbor (333). And, "So during this 18 years you have traveled back and forth over the same highway many, many times to and from work, at least every day or many times a day over that whole period, is that correct? Yes, that's right" (334).

And:

"You were also, Mr. Carlson, familiar with the fact that the railroad tracks ran alongside of this highway as is described on the diagram and shown in the pictures, particularly calling your attention to plaintiff's exhibit No. 31?

A. Yes, I am familiar with the highway.

Q. And you are familiar with the fact that it runs right alongside the railroad track?

A. Absolutely.

Q. And you are also familiar with the fact that around 5:00, or at least that particular time every night the railroad men are switching boxcars on this particular track in the evening; that is the customary thing for them to be doing at this particular time of night, isn't that true, Mr. Carlson?

A. Well, not always, no.

Q. But you knew that they did?

A. More or less, some place on the line between that time and the time they go home.

Q. So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact?

A. Yes.

Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track?

A. I did.

Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact?

A. That is right'' (335).

Moreover, Carlson actually saw plaintiff hanging on the box car as he drove around the curve. He testified:

''Now, Mr. Carlson, approximately how far away from Mr. Bellamy were you when you first actually observed him?

A. Just as I came around the curve I could see him hanging on the car.

Q. You could see him hanging on the boxcar as you were back here around the curve?

A. As I was coming around the curve, if you keep your eye on it continuously—more or less I was looking toward him, I could see him.

Q. You watched him, followed him, kept him in your line of vision from the time you first observed him coming around the curve until the time of the accident, is that correct?

A. Yes'' (336).

Carlson, from the time he rounded the curve, maintained uniformly his position in the highway and did not change course. He testified, "When you stopped your car, from the time you felt this bump until you stopped it, did you keep in the center of the highway or did you bring your car over to the right or left? A. Oh, I kept in the same direction, the same" (329). And again, "Mr. Carlson, you stated on direct examination that you kept close to the center of the highway from the first time you came around the curve and continued on the center line all the way and never changed your course, is that correct? A. That is right" (339).

The jury, on the other hand, could have found that Carlson, despite his knowledge over many years of the train movements and the fact that trainmen would be in and about the highway and of his actual notice that this particular movement was being made and that men were in the highway, nevertheless ran plaintiff down without exercising any precautions whatsoever for his safety. It was stipulated that he had testified by deposition, "And when did you first see Mr. Bellamy? A. Well, I first seen him when I got practically to him, I seen him hanging on to the box car. Q. And then what happened? A. Well, I kept on; I pulled out towards the center of the road to get more room, not knowing what he was going to do" (339-340).

Engineer Edwards testified, "It [the truck] swerved toward the center. The driver swerved toward the center when he saw Mr. Bellamy" (175) ("When he saw Mr. Bellamy" was stricken as a conclusion). And, "The point I am getting at, Mr. Edwards, is, how far was the truck from Mr. Bellamy at the time that it began to swerve?

A. Oh, a distance of about 20 feet. Q. What happened next? A. Oh, the rear end struck Mr. Bellamy in the back and tossed him into the road between the cars and the truck itself'' (176).

Conductor Lechner testified that following the accident he had a conversation with Carlson as follows:

> ''Then after I gave him the information, I said to Mr. Carlson, I said, 'I didn't see the accident. How did it happen?' And he said, 'Well, I'll be damned if I know. First I know the man was right in front of me, and I tried to miss him, but I guess I didn't. * * *
>
> State whether or not at that time and place he said to you, 'I know you work there every day'? Did he state that?
>
> A. Yes, he said—well, I think I said that to him, I said, 'You know we work around there all the time, don't you?' He said, 'Yes, I see you working there every day' '' (344-345).

The jury could also have found that Carlson had in the past on many occasions driven negligently around the places where the railroad trainmen were switching box cars and in the highway. He testified, ''Isn't it a fact, Mr. Carlson, that in particular one conductor by the name of C. D. Moore warned you many times about the way you drove around the spots where the men were switching box cars and in the highway? * * * A. I don't remember'' (342).

The jury could have accepted either of Carlson's versions if it saw fit. It could have rejected them both. It could have found that Carlson's testimony wherever it disputed plaintiff was carefully tailored to meet what it

regarded as the necessities of the defense. It could have found that Carlson's story that, though he saw plaintiff on the side of the box car and about to descend upon the roadway, he kept plaintiff constantly in view, but did not know that he had struck plaintiff down until "I felt a bump, and I came to an immediate stop" (329) to be completely fantastic.

The jury could have found that Carlson was driving at an excessive rate of speed when he ran plaintiff down.

Conductor Lechner testified, "Did anything pass your range of vision as you were looking at Mr. Husson and the cars? A. Well, this pickup truck came between my range of vision and the cars. Q. Did you estimate its speed? * * * I would say between 30 and 35 miles an hour?" (234).

Engineer Edwards testified, "Is it your opinion that this truck was moving at excessive speed? A. For the condition of everything there, I think he was" (198).

Carlson gave no warning. Plaintiff testified, "Now, Mr. Bellamy, did you have any warning that you were about to be struck before you were struck? A. No sir" (55-56).

Engineer Edwards testified, "Did you hear any sound of any horn from the truck before the collision? A. None whatsoever. Q. Did you hear any other warning of any type? A. No" (176).

The jury was entitled to find that Carlson did not apply his brakes until after he struck plaintiff. He left skid-marks 30 feet in length. Engineer Edwards testified "Did you see whether or not the brakes were applied on

the truck? A. Yes. Q. At what point were the brakes applied, or when? A. After Mr. Bellamy had been struck, there were skidmarks on the road. Q. About how long were the skidmarks? A. About 30 feet'' (176).

It could have found that Carlson was late with the mail and was in a hurry to get it to the postoffice. Carlson testified, ''Now, at the time you left your plant was your mail ready for you at the usual time, or was it late? A. No, it was late that evening. It should be ready at 5:00 o'clock, but this night it was late'' (331).

Engineer Edwards testified, ''Did you go up to him? A. He spoke to me, said that he was in a hurry to get to the post office with the mail'' (177).

Plaintiff was seriously and permanently injured. This was undisputed (145-169).

Dr. Leonard Barnard testified, ''I came to the conclusion that this man had, first, suffered a comminuted fracture of his left collarbone; that he had been fractured at the sixth, seventh and eighth ribs in the left chest; that he had suffered a severe laceration with some tissue loss from the left lower arm'' (152).

The injuries sustained in themselves show that plaintiff was struck with terrific force and that he was struck not as claimed by defendant's driver Carlson by the rear fender, but by the front end of the truck body. Dr. Barnard testified, ''With reference to the complaints in his upper back and neck, I felt they were justifiable on the basis of his shoulder fracture and secondary strain to the muscle structures. By that I mean the mechanism of trauma, being struck hard enough on the shoulder to

fracture the collarbone and the ribs. The back, I felt, must have sustained some injury as well'' (153).

Plaintiff's Exhibits Nos. 8 to 12, incl., photographs of plaintiff's injured arm, show a deep laceration of the flesh of the arm and Plaintiff's Exhibit No. 40, a photograph of defendant's truck, shows that the blow was inflicted by a sharp and penetrating, rather than a rounded, object.

The jury could have found that plaintiff was in the exercise of due care.

Plaintiff, on dropping from the freight car onto the highway, moved forward in the direction of movement of the train, that is, from east to west. He did not ''back against the current of traffic.''

Plaintiff testified that he ''Left the car and stepped over in the highway and was moving toward the switch'' (54).

Engineer Edwards testified, ''And he was backing up, wasn't he? A. He was sort of sidestepping toward the center of the road. Q. Wasn't he moving backward against the flow of traffic? A. More sidestepping. Q. Wasn't he backing against the current of traffic and backing into the road? A. No, he was more sidestepping'' (188).

Defendant's witness, Brakeman Joseph Quinlan, testified, ''And did he take that in a backward movement? A. In a swinging movement; he wasn't walking backwards'' (303).

The jury had the right to find that plaintiff was walking forward giving continuous back-up signals to the

engineer. He was not running. Plaintiff, though counsel succeeded in having him characterize his movements as "running-walking steps" and a "running motion" (98), also testified, "And you walked, did you, upon the point where you got off in a diagonal direction out into the highway? A. Yes, sir" (94). And plaintiff testified:

"Q. Now as an army man, you know that a marching step is at about four miles an hour?

A. I don't know exact.

Q. Is that about right?

A. Yes, sir, I have an idea that would be somewhere near right.

Q. And you were going faster than that, weren't you?

A. Not very much faster than that" (113).

Engineer Edwards testified, "Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). And, "At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else? A. He was the only one that my attention was directly upon" (207).

Plaintiff was into the highway five to seven feet. He was not near the center line. Plaintiff testified, "Could you give your best estimate as to how far away you were from the side of the train at the time you were struck? A. Approximately six, seven feet—six, seven, eight feet, six feet" (55). And, "Can you tell us about how far into the highway you were at the time you were struck? A. It would be hard to say; approximately—— Q. Well, have you any way—— The Court. Let him finish his answer. Mr. Phelps. I am sorry; go ahead. A. Six or seven feet; from five to seven feet. Q. And can you

say with reference to the center line of the highway? A. No, sir, I wasn't near the center line'' (99).

The jury could have found that plaintiff was the man in charge of the movement of this cut of freight cars. It could have found that plaintiff exercised, consistent with his duties as a railroad trainman, every possible precaution before he dropped off from the moving cut to the highway. Before dropping off he looked both east and west. When he looked east he saw as far as the curve of the track and the highway would permit and also to the point where the other trainmen were stationed on the highway.

Engineer Edwards testified, ''It was a continuous signal. Q. At the time Mr. Bellamy was giving you this continuous signal, who, if anyone, was in charge of the movement of the train? A. He was'' (202).

Plaintiff testified:

> ''Now, Mr. Bellamy, after you dropped off the train—well, first, before you dropped off the train, did you look in any direction?
>
> A. Yes, sir.
>
> Q. Which directions did you look?
>
> A. I looked facing the crew—I was facing the crew, and coming out and I was looking toward the east.
>
> Q. You were looking toward the east and then what happened?
>
> A. Left the car and stepped over in the highway and was moving toward the switch'' (54).

And, ''I was facing the train crew just as I stepped off the car onto the ground I turned towards the road, the highway and facing the engineer'' (91). Plaintiff testi-

fied, "And you rode in that position not looking at the box car itself but looking toward the shed where you had picked up the baby load? A. Yes, sir, I was in a position where I could turn my head to look in either direction. Q. Which way were you looking? A. I had been—well, I had faced each way; I had been looking in each direction coming out" (106). And, "A. Yes, sir; that is the reason I left the boxcar. Q. All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you? A. I looked in that direction [east] when I left the car" (136). And:

> "Q. And you were not extending your gaze away from the train, then; you were keeping it on the trainman, is that right?
>
> A. I was keeping it on the trainman and on the highway.
>
> Q. Well, if you were keeping it on the highway, how far on the highway did you keep it?
>
> A. Well, I could keep it just as far as I could see, because after you head in that direction you can easily see a man on the car and the highway, just as far back as you can see, as the curve will permit" (137).

The jury could also have found that after plaintiff dropped from the moving cut of cars to the highway his duties as a trainman were even more stringent to safeguard the movement and the train and the lives and limbs of the train crew and of the public. It could have found that he was required to constantly and he did keep his eyes upon the engineer and give the continuous signals as the train proceeded, being prepared to instantly stop

the train by signal to the engineer if the safety of either required it. It could have found that he would have been remiss in allowing the movement to proceed while turning his back upon it to further look to the east for defendant's approaching truck.

Engineer Edwards testified, "Well, with the movement, we had two cars to the rear of the engine and it was necessary for somebody to be in view at all times to see that these cars didn't hit any obstruction on the track behind us while we were backing up" (206). And, "At the time Mr. Bellamy was giving you a continuous back-up signal, were you receiving signals from anyone else? A. He was the only one that my attention was directly upon" (207). And, "Will you state whether or not it was also the custom and practice of the head brakeman to be in your view at all times? A. The head brakeman tries to keep in view of the engineer at all times" (219-220).

Conductor Lechner testified: "When you are switching, in switching movements or any movement, the brakeman is the eyes for the engineer. That is, they have to so distribute themselves so that they can convey signs to the engineer" (236). And:

> "Suppose a child ran out on that track on the west end, 10 or 15 yards from where that car was moving, and you were on the road where you were and he was where he was; whose duty would it be to signal the train to stop? A. My duty.
>
> Q. Your duty? A. I was across the highway where I could see the movement in both directions.
>
> Q. Let's assume that he didn't know where you were.
>
> A. Then it would be his [plaintiff's] duty" (238-239).

II. ARGUMENT.

THE WORKMEN-IN-THE-STREET RULE APPLIED TO PLAINTIFF. DEFENDANT WAS GUILTY OF NEGLIGENCE, AND PLAINTIFF WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

We shall, before discussing the points of argument presented by appellant in the order of presentation in its brief, establish that the plaintiff was a workman in the street and that under the rule applicable to him as such the defendant was guilty of negligence and plaintiff was not guilty of contributory negligence.

The appellant, in its "Statement of Facts" has completely ignored this subject. Nor has appellant in its brief attempted upon the record to even discuss it. Appellant contents itself with a mere reference thereto in connection with its claims that the court erred in its instructions on the subject.

The evidence establishing that plaintiff was a workman in the street and the rule of law applicable to him as such is, wholly aside from any other point in the case, decisive of this appeal.

We have heretofore shown that plaintiff was a member of a train crew moving a cut of freight cars from east to west on a track paralleled by a roadway upon which the defendant's driver was traveling in the same direction.

We have shown that plaintiff, in pursuance of his duties was required to ride the side of one of the cars in the moving cut, that he was the eyes of the engineer, that he was in charge of the movement, and that he alone could give the signals controlling its movement.

We have shown that as the movement was being completed, and in order to keep in sight of the engineer plain-

tiff was required to drop off the moving cut of cars and take the position upon the highway. We have shown that the plaintiff dropped off the freight car and, in order to keep the engineer in sight and in order to protect the movement, he dropped off the car and went into the highway a distance of approximately 6 feet; that while he was in the roadway giving the engineer a continuous back-up signal with his arms outstretched and facing the engine, as he was required to do, he was struck from behind and run down by defendant's truck.

We have shown that defendant's driver Carlson was more than 1,000 feet from plaintiff when he rounded the curve, during all of which distance his view was unobstructed. We have shown that while defendant's driver was traveling this more than 1,000 feet, plaintiff was moving forward approximately 20 steps at 2 miles per hour.

We have shown that although defendant's driver knew and had known for more than 18 years that train movements of this kind would be made at that hour of the day in the manner and in the circumstances of this one, and that he knew and had known that trainmen with similar duties were required to ride the cut of cars and to descend therefrom to the roadway and give signals to the engineer just as plaintiff did, defendant's driver, either seeing him in the roadway before him or not looking at all, negligently ran him down.

We have shown that defendant's driver was driving at an excessive rate of speed—35 miles an hour—without giving any warning whatsoever, and that he left skid-marks 30 feet in length.

We have shown that the plaintiff was in the exercise of due care; that he did not "back against the current of traffic," as claimed by appellant, but on the contrary was walking forward in the act of giving continuous back-up signals to the engineer. We have shown that he was walking and not running. We have shown that he was not near the center line of the highway, and that he was approximately 6 feet from the side of the train when he was struck.

We have shown that before dropping off, plaintiff looked toward both the east and the west; that when he looked east he could see as far as the curve in the highway would permit. We have shown that as he stepped from the car to the ground he was looking toward the east. We have shown that the plaintiff was required to safeguard the movement and the lives and limbs of the train crew and of the public by constantly keeping his eyes on the engineer to the west and giving the continuous signals as the train proceeded, and that he would have been remiss in allowing the movement to proceed while turning his back upon it to further look to the east for defendant's approaching truck.

It has long been settled law that under these facts plaintiff was a workman in the street and entitled to the benefit of the rules of law pertaining to such. The courts of California, over a period of many years and without a single exception, have so uniformly held.

The case of *Amore v. Di Resta* (1932) 125 Cal. App. 410, 13 P. 2d 986, is squarely in point and decisive. Joe Amore, the decedent, was employed by the Market Street Railway Company as a member of one of its over-

head line crews. He was a "ground man" charged with the duty of remaining on the ground to pass up materials to those working aloft, and to divert traffic away from the large tower-truck which was used by the crew in working on the overhead lines.

The defendant ran the deceased down in broad daylight.

He drove at a rate of speed of 30 to 40 miles per hour, "although the speed was slightly decreased upon approaching the truck" (p. 987).

Defendant testified that he did not see Amore or the tower-truck until he had struck Amore. He claimed his view was obstructed.

Overruling defendant's contention that he was not liable, the court said (p. 987):

> "On the contrary, we are of the opinion that the only rational conclusion which the jury could have reached was that the death of the deceased was proximately caused by the negligence of appellant and without fault on the part of the deceased."

The action of the trial court, in granting plaintiff a new trial for inadequacy of the verdict and "in limiting a new trial to the issue of damage alone," was affirmed.

In *Jones v. Hedges* (1932) 123 Cal. App. 742, 12 P. 2d 111, plaintiff's decedent, Jones, while working as a paving employee on a highway, was killed when he was struck by an automobile driven by the defendant. Jones at the time was following a truck near the edge of the shoulder of the road. Defendant claimed that her view was obscured by smoke generated by the release of hot oil in carrying on the work. Speaking of the status of Jones, the Court said (p. 115):

"It must be remembered, however, that Jones was one of the crew engaged in work on the highway, and had orders from his foreman to proceed to a position on the roadside and keep traffic off the apron. The measure of his duty to exercise care in his own behalf was therefore quite different from that of the ordinary pedestrian using the roadway merely for travel. The standpoint from which his conduct is to be viewed is that of a laborer whose duties required him to station himself on the highway as directed; and he was justified in assuming that operators of motor vehicles would use reasonable care and caution commensurate with visible conditions, and would approach with their cars under reasonable control."

In *State Compensation Ins. Fund v. Scamell* (1925) 73 Cal. App. 285, 238 Pac. 780, McNulty, a street sweeper, at night, was run down by an automobile. McNulty was at a point about 6½ feet from the gutter. "At this moment he was struck from the rear by defendant's automobile and rendered unconscious" (p. 781).

Of the status of McNulty, the Court said (pp. 781-782):

"Much less so is a laborer whose duties require him to be in the street in the performance of his occupation. Pedestrians are not continuously in the street, and their attention is devoted to a safe passage, while the attention of a street laborer must be to a considerable extent devoted to his task. There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. He may properly

assume that the automobilist will not be guilty of negligence in running him down without warning (King v. Green, 7 Cal. App. 473, 94 P. 777), and especially is this true where he remains within a space established for the parking of cars (Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078).

One so employed may also assume that a driver will give a signal or warning so that an accident may be avoided. Regan v. Los Angeles Ice Storage Co., 46 Cal. App. 513, 189 P. 474.

A man who is engaged in work upon the streets cannot, if he performs his duty, spend a large part, if not all, of his time looking for the approach of vehicles. In most streets, if he did so, he would accomplish little or nothing."

In *Zumwalt v. E. H. Tryon, Inc.* (1932) 126 Cal. App. 583, 14 P. 2d 912, plaintiff, a sheep herder, was run down by defendant's driver, in daylight, when he was trying to chase a lamb from the highway. Defendant tried to invoke California Vehicle Act, Section 150½, now Vehicle Code, Section 564, reading:

"Pedestrian to Walk on Left Side of Roadway.

No pedestrian shall walk upon any roadway outside of a business or residence district otherwise than close to his left hand edge of the roadway. (Enacted 1935.)"

Holding that plaintiff was not a traveler upon the highway and did not come within the provisions of this statute, the court said (p. 914):

"We are not inclined to take the view that respondent was a pedestrian on said highway, at the time of the accident, within the meaning of said section 150½.

> Respondent was not a traveler upon the highway, but was there as a herder in the performance of his duties as such. Laborers, whose duties require that they work in the streets, are not considered in the same light as pedestrians. Ceola v. 44 Cigar Co., 253 Pa. 623, 98 A. 775. In the case of such persons the degree of care is different from that of a traveler, whose whole attention is directed to protecting his own safety."

In *Woods v. Wisdom* (1933) 133 Cal. App. 694, 24 P. 2d 863, plaintiff was working on a highway operating a grader. One of his duties was clearing the highway of loose stones. He jumped from the grader and proceeded across the highway to remove them.

It was a clear day.

The defendant driver, nevertheless, ran him down. The court said (p. 864):

> "It seems clear, under the circumstances, that if the defendant had been observing the road ahead and had used even the slightest degree of care he would not have driven his automobile into plaintiff and caused his injury."

It also said (p. 864):

> "It has been repeatedly held that a laborer, whose duties require him to be in a public street, is not required to be constantly on the lookout for approaching vehicles, since he should devote his time to the performance of his duties. Under such circumstances it is the duty of the driver of a motor vehicle to keep an alert watch for laborers on the street and avoid running them down. The laborer is entitled to keep his mind on his work, and it is not negligence as a

matter of law for him to fail to continually look and listen for approaching vehicles. * * * Under such circumstances the contributory negligence of the laborer is a matter of fact to be determined by the jury. King v. Green, 7 Cal. App. 473, 94 P. 777. The jury having found the plaintiff free from contributory negligence and the defendant guilty of negligence which proximately caused the injury, we cannot disturb the judgment on appeal."

It further said (p. 864):

"The evidence discloses that defendant ran down a workman, who was in plain view, working on the street, without sounding any warning of his approach and while there were unoccupied portions of the street over which he might have driven if he had changed the direction of his car slightly and thereby have avoided the accident. We have concluded that under these circumstances the motorist who fails to change the direction of his car should give timely warning of his approach by sounding his horn and thus give the workman the lone chance of a jump for safety. It would seem that some warning should be given before a blow is struck by a dangerous agency such as a fast moving automobile. Common courtesy should require the warning, and the law should demand no less. Under similar circumstances evidence of the failure to give such warning has been held proper."

In *Mecham v. Crump* (1934) 137 Cal. App. 200, 30 P. 2d 568, plaintiff was engaged in overseeing and inspecting highway construction work. He was about 4 feet from the edge of the highway and was stooping over to get a key which had been thrown to him, but which lay on the highway. He was struck by defendant's automobile travel-

ing 40 to 45 miles per hour. Respecting the status of the plaintiff, the court said (pp. 569-570):

> "In the case now under consideration, respondent was not a pedestrian upon the highway, but was there in performance of his duties as foreman. Leventon, the contractor, testified that respondent's duties required of him to sometimes operate the equipment and sometimes to perform physical labor; in other words, his duties as foreman did not consist merely in standing back and directing others in the work that was being done, but as occasion demanded that he participate in whatever was necessary to be performed. Under these circumstances he is not to be considered in the same light as a pedestrian. * * * The question of negligence under such circumstances is one for the jury."

The court also said (p. 570):

> "Respondent had the right to assume that appellant Lillian Crump would not run him down, without warning, while he was engaged in the performance of his duties as foreman and particularly so as numerous warning signs were placed along the highway from the direction in which said appellant was traveling thereon."

The court further said (p. 570):

> "The fact that appellant Lillian Crump was traveling within the speed allowed by the California Vehicle Act does not exonerate her from negligence."

In *Scott v. City and County of San Francisco* (1949) 91 Cal. App. 2d 887, 206 P. 2d 45, plaintiff was employed by a roofing contractor as a member of a crew engaged in installing a roof on a building under construction. His par-

ticular duty was to tend a tar kettle. The tar kettle had been placed within 3 feet of the overhang of street cars. The plaintiff was "walking between the kettle and the track with his back to the oncoming street car" (p. 46), when he was struck by the street car. The court said (p. 47):

> "One whose duties require him to work in a public street is not held to the same quantum of care as a pedestrian. * * * Plaintiff testified that he looked to the south and saw nothing. The laborer in the street is required to use a lesser quantum of care than a pedestrian and even in the case of a pedestrian evidence that he looked in the direction from which danger might be expected and saw nothing ordinarily raises a jury question as to his contributory negligence."

Overruling defendant's contention that the rule as to street laborers should be limited, the court said (p. 47):

> "Respondents suggest that the rule with regard to the quantum of care required of workmen in public streets should be limited to those whose work has a direct relation to the streets, i.e., to street sweepers, trackmen, etc. The rule has not been so limited. In Zumwalt v. E. H. Tryon, Inc., 126 Cal. App. 583, 14 P. 2d 912, the rule was applied to a sheepherder driving his band of sheep along a public road, and in Ostertag v. Bethlehem, etc., Corp., supra; 65 Cal. App. 2d 795, at page 801, 151 P. 2d at page 650 the rule was applied to one working in the interior of a building under construction, * * *."

In each of the foregoing decisions, the court considered the alleged contributory negligence of plaintiff and either held, as it did in the *Amore* case, supra, that the work-

man was without fault, or that at most his contributory negligence was for the jury.

In none of the foregoing cases were the facts as conclusive in favor of the workman as here. In none of them were the duties of the workman such as to require his constant and unremitting attention to the performance of his work—a departure from which here could well have brought disaster to the train, the train crew, or the traveling public.

Certainly upon this record and the applicable law, the issues of negligence and contributory negligence were resolved by the jury's verdict and that verdict is here conclusive.

A. Appellant's contention that the evidence was insufficient as a matter of law to establish negligence on the part of defendant.

We have shown at considerable length in our statement of the case the facts which the jury was entitled to find by its verdict. Appellant's "Statement of Facts" is so far from the actuality as to present a wholly different case from that which was tried. Appellant does not even credit the record with, nor take into consideration, that which it itself by its witnesses admitted upon the trial.

Far from this record failing to show negligence on the part of the defendant, it conclusively establishes negligence as a matter of law. It does this even assuming plaintiff was a pedestrian and without benefit of the workmen-in-the-street rule.

Consistently and uniformly the appellate courts of the State of California have held that a motor vehicle driver

who runs down a person in broad daylight in front of him on the street or highway is guilty of negligence.

In *Quinn v. Rosenfeld* (1940) 15 Cal. 2d 486, 102 P. 2d 317, the case was tried to the court without a jury.

Plaintiff, a pedestrian, was crossing a San Francisco city street in the residential district at 6:35 P.M. at a point other than a cross-walk. The defendant testified that at no time did he see a man in the path of his car, but that he became aware of a shadow which he thought was a car backing out from the curb and that he swerved to his left to avoid it. Affirming plaintiff's judgment, the court said (p. 319):

> "By section 562(a) of the Vehicle Code the plaintiff was required to yield the right of way to all vehicles on the roadway. But by the provision of subdivision (b) of the same section the defendant was not thereby relieved from the duty of exercising due care. His duty did not arise only when he saw the plaintiff. It was a constant duty, and that duty would be breached if, under the circumstances, he failed to see what an ordinarily prudent person exercising due care would have seen. We cannot say that before proceeding the plaintiff should have waited for a vehicle to pass which was traveling at a relatively slow rate of speed and approaching from a distance of 135 to 150 feet, nor that his failure to do so necessarily constituted a violation of the statute. On the record here presented the question whether the plaintiff did all that a reasonable man was required to do in compliance with the statute, the questions of negligence, contributory negligence and of proximate cause, were for the court to determine."

In *Wiswell v. Shinners* (1941) 47 Cal. App. 2d 156, 117 P. 2d 677, plaintiff's decedent, a pedestrian, crossing the street at a point other than a cross-walk, was struck by defendant's automobile moving 25 to 30 miles per hour. The defendant testified "that there was nothing to obstruct his view of the street ahead of him and that he was at all times looking straight ahead; but when asked whether or not he saw the deceased at any time prior to the impact, the driver testified, 'It is blank to me. I don't recall. The only thing I recall is the impact'" (p. 679). The trial court directed a verdict against plaintiff.

Reversing the judgment, and remanding the case for a new trial, the court said (p. 681):

> "The evidence in the case before us points unerringly to the fact that the accident occurred in broad daylight with the weather clear and the view of the driver unobstructed from the time he passed through the intersection east of the one at which the fatality occurred. The aforesaid duty imposed upon the defendant by the provisions of the Vehicle Code would be breached if under the circumstances he failed to see, when an ordinarily prudent person, situated as he was and using due care, would have seen. The driver of a vehicle is not guilty of negligence under the circumstances here shown if he did those things which a reasonably prudent person would have done under similar circumstances. Neither was the decedent guilty of contributory negligence if, seeing what he saw and knowing what he knew, his behavior and conduct was the equal of that of an ordinarily and reasonably prudent person. And, it must be remembered that the law requires that a driver shall always maintain a vigilant watch for other persons and vehicles using the highway. Under the facts disclosed

in the instant case, the jury might have concluded that the driver of the automobile failed to perform his requisite duty and that such failure was the proximate cause of the fatal injuries sustained by the decedent."

In *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 130 P. 2d 121, plaintiff, crossing the street in the middle of the block and at a point where there was no cross-walk, was struck by defendant's car.

"Defendant and his son, who was riding with him in the front seat, testified that they did not see plaintiff before the impact although they were both observing the highway. They, as well as other occupants of the automobile, estimated its speed as between 18 and 20 miles per hour. Witnesses for the plaintiff testified that the automobile was traveling at a rate of 40 to 45 miles per hour. Defendant brought his car to an almost immediate stop after the right front part of the car struck plaintiff" (p. 122).

Affirming plaintiff's judgment, the court said (p. 122):

"The evidence as to the negligence of defendant was conflicting. The ability of defendant to stop his automobile within five feet after the collision suggests the improbability of excessive speed, but even if the court accepted the defendant's version in that regard it might have concluded that defendant was negligent in not observing plaintiff on a well lighted street."

In *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243, plaintiff, a pedestrian, was struck by defendant's automobile while crossing the street in the middle of the block and at a point where there was no marked cross-walk. "It was a custom well known to appellant

that patrons of the market crossed the street at the point of the accident in going to and from the market on the westerly side of the street'' (pp. 244-245).

Affirming plaintiff's judgment holding that the issues of negligence and contributory negligence were for the trier of facts, the court further said (p. 245):

> ''The duty imposed upon appellant by section 562(b) of the Vehicle Code, to exercise due care for the safety of pedestrians upon the highway, is emphasized by his evidence, to which we have referred, that he well knew that it was the custom of patrons of the market to cross the street near the middle of the block where the accident took place.''

In *Huetter v. Andrews* (1949) 91 Cal. App. 2d 142, 204 P. 2d 655, plaintiff, a passenger in an automobile, was injured when the driver seeing defendant's car approaching 850 feet away, proceeded in low gear across the highway to pass over a paved cross-over between the divided lanes. Defendant's automobile struck the left side of the Huetter car at a speed of 40 to 50 miles an hour.

The day was clear and dry. After defendant drove the said distance of 850 feet there were no cars or other objects of any kind which obstructed his view.

Although defendant was looking straight ahead the entire time, defendant did not see the Huetter car until he was 75 to 100 feet away from him.

The jury returned a verdict in favor of defendants.

Reversing the judgment and remanding the case for trial on the issue of damages only, the court, in part, said (p. 658):

> "That appellant's 'claim' as above recited is supported by the evidence there can be no question. And that such conduct amounts to negligence as a matter of law is well supported by the authorities. In the circumstances revealed by the record one who does not see that which is clearly visible and would have been seen by one exercising ordinary care, as result of which a collision occurs, is guilty of negligence as a matter of law."

Manifestly, upon the record here, defendant's negligence, through its truck driver, was at least an issue of fact for the jury.

B. Appellant's contention plaintiff was guilty of contributory negligence as a matter of law.

The whole predicate of defendant's contention that plaintiff was guilty of contributory negligence as a matter of law is based upon a completely mistaken and unfounded view as to the record in the case.

We have shown at some length in our Statement of the Case that plaintiff conducted himself with due care and that at the most his contributory negligence was a question of fact for the jury. We have affirmatively shown that the statements made in appellant's argument under this head, that plaintiff "ran into the stream of traffic on the highway", that "he did not look in the direction of approaching traffic," that "he dashed out into the highway," "with his back to oncoming traffic" are completely without foundation, in the teeth of the facts which the jury was entitled to find, and founded upon mere assertion.

It will suffice, we think, without repeating what has already been said, at this point to demonstrate the wholly gratuitous character of the assertions made.

Appellant, at first states that plaintiff did not look, and later broadens the statement to say that looking "a few moments" "before dashing out into the highway" cannot be claimed to have fulfilled his duty to look again.

The fact is that plaintiff was looking toward the east in the very act of dropping from the car to the highway. He testified:

> "Mr. Bellamy, before you got off the boxcar, didn't you turn around so that you were then facing the engineer—and this is while you were still on the ladder?
>
> A. No, sir. Could I kind of explain that?
>
> Q. Well, if you can, I want you to, certainly, but first, can you answer that question one way or the other and then explain all you want?
>
> A. I was facing the crew when I let loose of the ladder, just about the time I was supposed to let loose of the ladder and light on the ground" (90).

And, "All right. And after you got off the boxcar, you didn't look back to see whether he was in your view when you stood at B-1, did you? A. I looked in that direction when I left the car" (136).

Upon the erroneous assumption that plaintiff did not look, appellant proceeds to cite, upon a wholly erroneous state of facts, what is claimed to be applicable and controlling law.

In *Mundy v. Marshall* (1937) 8 Cal. 2d 294, 65 P. 2d 65, the pedestrian was drunk, "he looked straight ahead

and neither to the right or left as he left the curb" (p. 66).

In *Pearl v. Kaline* (1947) 82 Cal. App. 2d 910, 188 P. 2d 58, a pedestrian case, *Mundy v. Marshall* was distinguished and the trial court's order granting a new trial after verdict for defendant was affirmed.

In *Cortopassi v. California-Western R.R. & Nav. Co.* (1940) 39 Cal. App. 2d 280, 102 P. 2d 1093, plaintiff's decedent was killed when struck by a gasoline railroad locomotive. The trial court had granted defendant's motion for nonsuit. The court reversed, holding plaintiff's decedent's contributory negligence for the jury and *Mundy v. Marshall,* supra, was again distinguished.

Appellant next cites *Chase v. Thomas* (1935) 7 Cal. App. 2d 440, 46 P. 2d 200, but from even appellant's recital of the facts "plaintiff stepped from a place of safety, and without looking, had walked into the highway where defendant's vehicle struck him."

The same court, in the later decision of *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243, held the exact contrary, citing *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 62, 130 P. 2d 121, and said (p. 245):

> "The mere crossing of a street by a pedestrian in the middle of the block does not constitute contributory negligence that would preclude him from recovering damages if injured by an automobile. Fuentes and Tomey cases, supra."

Appellant next cites *Deike v. East Bay St. Rys.* (1935) 7 Cal. App. 2d 544, 46 P. 2d 812, for the proposition that the duty of a pedestrian to look is "a continuing duty and was not met by looking once and then looking away."

In *Amendt v. Pacific Elec. Ry. Co.* (1941) 46 Cal. App. 2d 248, 115 P. 2d 588, even though it, like the *Deike* case, is a street car and not a motor vehicle case, the court distinguishes the *Deike* case and other cases cited by appellant and holds them inapplicable with the simple statement, "In each of them plaintiff used no caution."

In each of the remaining cases cited by appellant the undisputed evidence likewise showed that the pedestrian took "no precaution at all for his own safety," or that the "stop, look and listen rule" applicable to railroad crossings was applied.

In *Connolly v. Zaft* (1942) 55 Cal. App. 2d 383, 130 P. 2d 752, it was specifically held that the "stop, look and listen rule" does not apply to the pedestrian about to cross the street.

In *Toschi v. Christian* (1944) 24 Cal. 2d 354, 149 P. 2d 848, the former rigidity of the "stop, look and listen rule" is modified even in a railroad crossing accident case.

In *Southern Pacific Co. v. Souza* (9 Cir. 1950) 179 F. 2d 691, this court recognized it to be the law of California, that even a driver of an automobile is not, as a matter of law, required to look a second time in a railroad crossing accident. This court says (p. 693):

> "However, the more recent decisions of the courts of California, although they have not expressly overruled the old cases, show a definite policy trend away from the 'crystallized fact' cases and favor making the standard of care a question for the determination of the jury. Several California decisions have held on similar fact situations that whether or not the

driver's choice of a place to look and his failure to look a second time constituted negligence were questions of fact for the jury."

The true rule in California is that expressed by the Supreme Court of California in *Salomon v. Meyer* (1934) 1 Cal. 2d 11, 32 P. 2d 631, wherein the court specifically and categorically holds that the proposition of law contended for here by appellant, is erroneous.

In that case the pedestrian looked in the direction of the approaching vehicle as she stood on the curb. She did not thereafter, in proceeding across the highway, look again. There, as here, the defendant contended that such conduct constituted contributory negligence as a matter of law. Defendant succeeded in obtaining an instruction to the jury as follows (p. 632):

> " 'I instruct you that it is a duty resting upon any person attempting to cross a street that is likely to be dangerous, before placing himself or herself in a position of danger, to look in the direction from which such danger is to be anticipated. This is a continuing duty, and is not met by looking once and then looking away.' "

Holding the instruction to be an erroneous statement of law, and reversing the judgment in defendant's favor, the court said (p. 633):

> "The vice of the instruction here complained of lies in the unqualified statement that 'this is a continuing duty, and is not met by looking once and then looking away.' Whenever there is room for an honest difference of opinion between men of average intelligence, the question of whether the plaintiff was neg-

ligent in failing to look again in the direction from which the defendant's car was approaching is a question of fact for the jury and the finding of the triers of fact is conclusive. McQuigg v. Childs, 213 Cal. 661, 3 P. (2d) 309. Counsel for appellant have made calculations based upon the speed with which the plaintiff walked and the speed at which the defendant testified he was driving, the accuracy of which is not challenged by the respondent, and by which it is claimed to have been shown that the car was at least 132 feet away when the plaintiff saw it as she stood on the curb. Whether plaintiff's conduct thereafter in proceeding across the street in the crosswalk without again observing the approach of the defendant was consistent with ordinary care is a question to be determined from a consideration of all the facts and circumstances of time, place and conditions of traffic."

In *Goodwin v. Foley* (1946) 75 Cal. App. 2d 195, 170 P. 2d 503, a pedestrian case, the exact instruction given by the court in the *Salomon* case was again before the court. The jury had returned a verdict in favor of the defendant. The court, reversing the judgment, following *Salomon v. Meyer,* supra, holds that the giving of the instruction was reversible error.

In *Woods v. Eitze* (1949) 94 A.C.A. 979, 212 P. 2d 12, hearing denied 1950, a pedestrian was struck by defendant's automobile while crossing the roadway at a point other than at a cross-walk. There, as here, the defendant claimed that plaintiff was running, and the evidence showed that defendant swerved to avoid striking her, and left skid marks. The jury returned a verdict in favor of plaintiff for only $5,000. The trial court granted plain-

tiff's motion for new trial solely upon the issue of damages. Defendant appealed, contending that plaintiff was guilty of contributory negligence.

The court, affirming the trial court's order granting a new trial following the decision of the Supreme Court of California in *Fuentes v. Ling,* supra, said (pp. 15-16):

> "In the latter case the court held that the question of plaintiff's contributory negligence is for the trial court to determine and its findings when supported by the evidence will not be disturbed on appeal."

In *Cole v. Ridings* (1950) 95 A.C.A. 168, 212 P. 2d 597, a minor was crossing the roadway at a point other than a cross-walk at 4:30 in the afternoon of a dry, clear day, when she was struck by a motorcycle driven by defendant. The defendant claimed that the little girl "darted right out in front of the motorcycle * * * From behind the ice cream truck. * * * Running" (p. 599). The jury returned a verdict in favor of the defendant. Plaintiff appealed. The evidence showed that before crossing "Appellant looked in both directions" (p. 599). The court held that an instruction to the jury to the effect that Section 562(a) of the Vehicle Code required the pedestrian to yield the right of way and that it was a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting her before attempting to cross a street, was erroneous. The court said (p. 601):

> "These instructions emphasized the duty of appellant to yield the right of way and failed to inform the jury clearly that such duty was not absolute and that the real question was whether appellant exercised reasonable care under the circumstances."

It further said (p. 601):

> "It should be noted that there is some evidence of contributory negligence on the part of appellant, but it can hardly be said that the record shows contributory negligence as a matter of law; that was an issue of fact for the jury."

It is clear that the law of *Salomon v. Meyer,* supra, as reaffirmed in *Goodwin v. Foley,* supra, is firmly established as the law in California and that appellant's whole position is without basis and without merit.

C. Appellant's contention that the court erred in instructing the jury on the subject of workmen in the street.

Appellant here complains that the trial court erred when "it instructed the jury that appellee was entitled to the benefit of the rule." The trial court did no such thing.

The instruction, set out immediately following this claim by appellant, submits to the jury the issue of fact whether "plaintiff was required by his duties to be upon the highway" etc., and, if so, the rules governing his conduct.

As we have shown in our Statement of the Case, the record conclusively establishes that plaintiff was a workman in the street. Appellant gives lip-service to the rule governing workmen in the street, but it does not give credit to either the facts in this case nor to the law governing them.

Appellant again bases its position upon a misconception of what the case was about and nothing quite illustrates this better than the following admission taken from its brief at page 31, wherein appellant says, "Had

Bellamy already gained the center of the highway and been (perhaps) walking towards the west giving signals, etc. it might be argued that he would at such time be entitled to the benefit of the rule."

The fact is that plaintiff was walking toward the west, giving signals, etc., and, by appellant's above quoted concession, his whole contention is destroyed.

The assertion made by appellant in the quotation, however, is inexcusable. It is, we think, characteristic of appellant's presentation of both purported facts and law on this appeal.

We have pointed out, in perhaps too voluminous detail, the testimony conclusively establishing that plaintiff was a workman in the street. Our justification for treating the record so exhaustively in this, as well as in other respects, is the fact that the above statement is made without apology and without justification by the appellant, and that it is typical of like effort by appellant in other instances.

The fact is that Engineer Edwards testified, "Did you see what he did after he left the car? Mr. Bellamy? A. Stepped out into the road and giving me signals with his hand outstretched, his arms outstretched (indicating)" (174). Testifying further, "Will you tell us what that signal was? A. It is a back-up signal. Q. Will you stand and demonstrate how that signal was given? A. This way here (indicating). He was facing the engine, so he would give a signal like this to back away from the position in which he was standing. Q. Was that a continuous signal or otherwise? A. It was a continuous signal. Q. At the time Mr. Bellamy was giving you this

continuous signal, who, if anyone, was in charge of the movement of the train? A. He was'' (202).

We have likewise shown at considerable length that plaintiff, while giving this continuous signal was ''walking towards the west.'' It was not only proper to give this instruction, but it would have been error not to give it.

In support of its claim that the instruction should not have been given, appellant cites only the case of *Lewis v. Southern California Edison Company* (1931) 116 Cal. App. 44, 2 P. 2d 419. The *Lewis* case does not even remotely involve a state of facts comparable to those here, nor does it hold even on the state of facts there present that the plaintiff could not recover.

At page 31 appellant states, ''we submit that, as a matter of law, a workman who dashes from a place of safety into the path of an approaching danger, without looking, has not observed even a minimum standard of care.''

Appellant has misread the *Lewis* case.

The court there actually recognized that deceased's contributory negligence was for the jury. It said (p. 422):

> ''Upon the question as to whether deceased was guilty of contributory negligence, there was apparently some conflict in the evidence. This, however, was not sufficient to prevent the trial court from granting a new trial on the ground of the insufficiency of the evidence.''

In that case the plaintiff recovered a judgment, the trial court granted a new trial on all of the grounds in the notice of intention, and plaintiff appealed.

Plaintiff's decedent, a swamper on a garbage truck, stepped off the running-board of the truck in a space of not more than approximately 4 feet after deducting the distance of clearance of an automobile by defendant's automobile.

Plaintiff's sole witness was impeached by at least three witnesses. On the trial he altered and contradicted his evidence.

The appellate court, under the familiar rule, affirmed the trial court's granting of the new trial and observed *obiter,* "We believe such rules [the rules relating to the workmen in the street] do not apply if the workman, as in this case indicated, without notice, suddenly jumps from the left running board of the garbage truck in front of the approaching car" (p. 423). It is to be noted that this decision was rendered in 1931 and that it has never again been cited on the propositions contended for by the appellant.

In the *Lewis* case there was no evidence whatever that the defendant's driver had any notice that the deceased would descend from the truck, let alone jump from it in the circumstances outlined.

It is to be noted that there the deceased jumped from the truck, not at the curb line but at the center line of the highway, in a space of approximately 4 feet.

There was in that case no evidence that it was the duty of the deceased to descend at the point he did.

Far from holding that the defendant was guilty of no negligence, or that plaintiff's decedent was guilty of contributory negligence as a matter of law, the decision of the court left the case open for a new trial.

If appellant is correct in its claim that the workmen-in-the-street rule did not apply in the circumstances here, then each of the courts was wrong in the many decisions reviewed by us holding that the rule was applicable. In none of those cases was there any evidence that the duties of the workman prevented his taking additional precautions. Here the evidence was undisputed that plaintiff, prior to and including the very moment he was struck, was actually engaged in the duties of directing the movement of a live and moving train and that these duties precluded him from dropping them and hazarding the lives and limbs of the trainmen and the traveling public as well. If the rule was applicable in those cases, it was doubly so here. Indeed, what appellant was really contending for was the emasculation of the workmen-in-the-street rule, and if its contention is adopted here, the very essence of that doctrine is obliterated from the law. The predicate of the rule is not that the workman could not, in the particular circumstances, have taken time out to look for approaching vehicles, but that, because he is a workman and his attention, as stated in *State Compensation Ins. Fund v. Scamell,* supra, "*must be to a considerable extent devoted to his task*" (pp. 781-782) (italics ours), "He may properly assume that the automobilist will not be guilty of negligence in running him down without warning" (p. 782). Here the plaintiff was not only a workman in the street, but the transcendent importance of what he was doing at the time prevented his taking time out to further watch for the approach of defendant's truck.

D. Appellant's claim of error in the refusal of appellant's proposed instruction that the workmen-in-the-street rule had no application "if the jury should find that appellee 'suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle' ".

At page 33 of appellant's brief it makes the wholly gratuitous assertion in support of its claim of error "(and the evidence [Tr. 97-99] was without conflict on the point) that Bellamy 'suddenly left a place of safety without notice and proceeded into the path of the approaching vehicle.' "

The quick answer is that there was no such evidence in the case.

To the contrary we have shown in our Statement of the Case that defendant's driver Carlson knew and had known for more than 18 years that train movements of this kind would be made at the hour of the day, in the manner and in the circumstances of this one. He knew and had known that plaintiff and trainmen with similar duties were required to ride the cut of cars and descend from the car to the roadway and give signals just as plaintiff did.

More specifically, Carlson himself testified on cross-examination, "So you knew that these men were working in and about the highway at the particular time of this accident; isn't that a fact? A. Yes. Q. And you also stated that as you were coming around the curve you saw two men that were connected with this railroad movement drop off and cross over the track? A. I did. Q. So it was no surprise to you in any way when you found men working in and about the highway; isn't that a fact? A. That is right" (335).

Furthermore, the undisputed evidence shows that plaintiff whether while on the freight car, descending therefrom, or upon the highway was in the pursuance of his duties.

We have already shown that the only case cited by appellant, in support of the requested instruction, *Lewis v. Southern California Edison Company,* supra, has no application to the facts of this case.

Lastly, we are at a loss to understand wherein appellant has any complaint. The court actually placed upon the plaintiff in the instruction it did give, and made the subject of plaintiff's claim of error under the heading "C", the same burden under the workmen-in-the-street rule as that placed upon a pedestrian. The last two sentences of the instruction shown at page 28 of appellant's brief are as follows: "But while the degree of care is less than that of an ordinary pedestrian, and while such workman has a right to assume that motorists would use ordinary care for his safety, this rule does not mean that such a workman is not bound to use ordinary care for his own safety and may walk into the path of danger without exercising such care. Furthermore, a workman going to and coming from his place of work on the highway must use the same degree of care for his own safety as any pedestrian on the highway." This was far more favorable to the defendant than the authorities on the subject permit, and the fact is that the giving of the instruction which the court did give was error as to the plaintiff.

E. Appellant's claim of error in the court's refusing to give appellant's requested instruction that the workmen-in-the-street rule does not apply to the pedestrian who may only occasionally use the street.

In support of appellant's requested instructions Nos. 3 and 4 it cites only the case of *Milton v. L. A. Motor Coach Co.* (1942) 53 Cal. App. 2d 566, 128 P. 2d 178. There a commercial photographer, at night, was standing in Wilshire Boulevard with a black hood over his head and was viewing through his camera, when he was struck by a motor coach of the defendant. He, nevertheless, recovered a judgment. On appeal, the appellate court held, not that the plaintiff was not entitled to recover, but merely that the evidence of custom of taking photographs in the street was insufficient to charge defendant's driver with knowledge thereof, and that the court erred in its instructions on submission of the case. But for the errors adverted to, the court would have affirmed the judgment. It did send the case back for a new trial.

It is also to be noted that even in these circumstances Justices Carter and Traynor dissented on the denial of a hearing in the Supreme Court.

Appellant again ignores the record in the case showing that the plaintiff was required to perform his duties in the street, that he was in the act of performing them, and that the defendant's driver knew that he would be so engaged.

But, wholly aside from these matters, there is no basis whatsoever for appellant's complaints. The trial court fully covered the subject when it told the jury in its workmen-in-the-street instruction that such instruction applied only "If you find from the evidence that the

plaintiff was required by his duties to be upon the highway, etc." "Required" is synonymous with "necessarily," "compelled," "directed" and the like. (37 W. & P. Perm. 89).

In *Southern Ry. Co. v. Smith*, 59 S.E. 372, the court held that,

> "A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine at the time he was thrown therefrom was the usual and proper place for him to be, is an employe 'engaged in service requiring his presence' on an engine."

The instruction given by the court was more favorable to the defendant than the authorities on the subject warrant.

Lastly, the appellant makes the claim that the alleged errors were accentuated by the fact that the court in its instruction described appellee as one of a class "whose duties required them to be" on the highway. It is said that the court committed "error in assuming in view of the conflicting evidence, that appellee's status as a workman in the street had been established as a matter of law".

This claim, we think, is preposterous. The fact is that the language complained of was immediately followed by the statement "If you find that the plaintiff, William A. Bellamy, was upon the highway in such a position that defendant Cement Company's driver in the exercise of reasonable care, could have discovered his presence, but failed to do so, then, and in that event the said driver

was negligent." By this language the court only gives to the plaintiff the benefit of the pedestrian rule and plaintiff was deprived of the benefit of the "workmen in the street" rule and an instruction conforming to the rules of law laid down in the workmen-in-the-street cases, such as "it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them" (*State Compensation Ins. Fund v. Scamell* (1925) 73 Cal. App. 285, 238 Pac. 780), supra, and "Under such circumstances it is the duty of the driver of a motor vehicle to keep an alert watch for laborers on the street and avoid running them down" (*Woods v. Wisdom* (1933) 133 Cal. App. 694, 24 P. 2d 863, 864), supra.

F. Appellant's claim that the court erred in instructing the jury that plaintiff was lawfully using the highway.

The court did not do so. In perfect propriety it defined the duty of an operator of an automobile. The court submitted to the jury the question whether plaintiff was lawfully using the highway. The sentence in which the phrase is used is contained and is prefaced by the following "If you believe from the evidence that" Instead of taking the question away from the jury the instruction actually submits it as a prerequisite to a finding of negligence. It did not assume by way of recital, or otherwise, that plaintiff was lawfully using the highway.

Incidentally, a comparison with plaintiff's instruction No. 18, as set out at page 37 of appellant's brief reveals the presence of commas in the last sentence making it read, "* * * so as to avoid colliding with plaintiff, lawfully using said highway, then I instruct you that in that event he was negligent", whereas plaintiff's requested

instruction No. 18 as set out in the transcript of the record at pages 22-23 shows the absence of commas, and the quoted provision actually reading "* * * so as to avoid colliding with the plaintiff lawfully using said highway, then I instruct you that, in that event, he was negligent."

Next, appellant makes the statement (Br. for Appellant pp. 37-38) that the trial court "* * * inferred that appellant's driver erroneously assumed that the road was clear, that he was not vigilant, and that he had failed to anticipate or expect the presence of others."

Appellant then makes the bald assertion, "There was no evidence anywhere in the record to support such an inference, and that portion of the instructions was therefore obviously erroneous. Carlson's testimony was otherwise (Tr. 322-343). He actually saw appellee on the train and saw him jump off the train" (Br. for Appellant, p. 38).

The statement is untrue. We have shown it so to be by our Statement of the Case, and particularly at pages 7 to 15.

George P. Lechner testified that following the accident he had a conversation with Carlson, that "I said, 'I didn't see the accident. How did it happen?' And he said, 'Well, I'll be damned if I know. First I know the man was right in front of me, and I tried to miss him, but I guess I didn't' " (344-345).

G. Appellant's claim that the trial court committed prejudicial error in giving plaintiff's proposed instruction No. 19.

In support of its claim of error it says, "There was no evidence whatsoever that appellant's driver failed to discover appellee's presence on the highway or that he looked and did not see" (Br. of Appellant, p. 40). This is the same gross misrepresentation of the record made under appellant's claim of error "F", and our reply is the same as the one we made there, and this disposes of the point.

The appellant complains that in this instruction the court referred to "appellant's driver" (we assume it meant to refer to appellee) as being one of a class "the performance of whose duties require them to be" on the highway.

The instruction, a glance will reveal, is the statement of a general rule of law and the issues submitted to the jury are whether the plaintiff was in such position that defendant's driver, in the exercise of reasonable care, could have discovered his presence. The case of *Clarke v. Volpa Bros.* ((1942) 124 P. 2d 377) cited by appellant, contributes nothing on the subject.

To the contrary, and specifically in point, is the decision of the court in *Bischell v. State* (1945) 68 Cal. App. 2d 557, 157 P. 2d 41, wherein exactly the same shop-worn contention so often used by defendants, was made and overruled. There the court gave an instruction reading, "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it," etc. (p. 44). The defendant claimed "that the instruction assumed as a fact that the fire truck [which

collided with plaintiff's automobile] was clearly visible and clearly audible when, in fact, the evidence on the question was conflicting" (p. 44). Rejecting defendant's contention, the court said (p. 44):

> "There is ample evidence that the fire truck could have been seen and the siren heard by plaintiffs had they exercised reasonable care and vigilance. They offered many reasons why the truck could not have been seen or the siren heard by them. These were questions of fact for the jury to determine. The instruction does not assume that the fire truck was plainly visible or the siren plainly audible, but leaves to the jury the application of the general rule to the facts in the case."

It is of interest in this case that this defendant requested the court to give a total of 48 separate instructions and that the Southern Pacific Company requested the court to give an additional 58 separate instructions—a total of 106.

It is of more than passing interest that this defendant requested that the court give its requested instruction No. 17 on the subject of duty to look, reading as follows:

> "Duty to Look
>
> It was the duty of the plaintiff William A. Bellamy to use reasonable care to look for vehicles on the road before he attempted to use it. This duty is *not* fulfilled by looking and failing to see that which is readily and clearly visible. 'When to *look* is to *see*, the mere statement that one *did* look and *could not* see, will be disregarded as testimony' ".

And that the trial court gave the requested instruction.

If appellant's argument is sound that plaintiff's requested instruction No. 19, complained of here, assumes facts when the court actually submits the issue to the jury, then it must be doubly true that the defendant itself requesting its instruction No. 17, likewise assumes facts against the plaintiff. By the same token, each of the defendant's requested instructions against plaintiff, hereinafter reviewed, assumed the facts against the plaintiff.

A mere reading of the instructions given by the court in this case (351-389) will demonstrate that the trial court "leaned over backwards" in protecting the interests of the defendants before the jury. It will show, on a comparison with the instructions requested by the defendants, that the court actually gave 61 of those requested by defendants. The court, on the subject of liability gives 3 of plaintiff's requested instructions, and defendant complains of each of them.

It will show that, in tenor and spirit as well as in substance, the instructions as a whole are adverse to plaintiff and far more favorable to defendants, and in particular to this defendant, than the applicable law permits. The instructions in large part constitute an admonition against the plaintiff and placed the plaintiff before the jury in a far less favorable light than the defendants.

Aside from the usual stock instructions the trial court instructed the jury that the plaintiff must prove negligence, that the defendants were not insurers, and that plaintiff could not recover unless he proved negligence and that such negligence was the proximate cause of the accident.

The court told the jury that the defendants do not have the burden of proving freedom from negligence, that such burden was on the plaintiff.

It instructed the jury that they were not to be influenced by sympathy, passion, or prejudice.

It told the jury in a *civil* action that, if, after the consideration of the whole case "your minds are in doubt or uncertainty as to the negligence of either of the defendants, etc." (357) it was their duty to return a verdict in favor of the defendant or both of them.

The jury was told that a verdict could not be returned against the defendants merely because an accident happened and his injury resulted from it. The jury was told that if the accident was "inevitable or unavoidable" (358) "the plaintiff is not entitled to recover anything" (358).

It told the jury at this defendant's request, as previously pointed out, that the plaintiff was required to "use reasonable care, to look for vehicles on the road before he attempted to use it" (362). The jury was further instructed that if there were two ways of performing an act, one dangerous and the other safe, the one who with knowledge chooses the perilous one, is guilty of negligence and further that a *person crossing a highway* in front of an approaching vehicle cannot close his eyes to danger, if any, *in reliance upon the presumption* that the other party will use reasonable care and prudence and obey the traffic laws.

The court stated "that a pedestrian who attempts to cross a highway at other than a regular crossing place must exercise greater precaution than at an established crossing" (363).

The jury was told that defendant's driver Carlson "cannot be charged with negligence simply because he might have avoided the accident had he acted differently" (363).

The jury was also told that there was no presumption which defendant's driver was required to indulge that persons alongside the highway "in front of him will not exercise the care requisite to their own safety" (364) and that a motorist "who is himself exercising ordinary care has the *legal right to assume that pedestrians ahead of him" will exercise "the amount of care necessary for their own safety"* (364).

The jury was instructed that if plaintiff's appearance on the highway constituted a confusing emergency, or defendant's driver Carlson was faced with a sudden peril or danger, he could be excused. These were not proper under the evidence.[4]

The jury was told that the *prima facie* speed limit was 55 miles per hour, that the area in which the accident occurred was not sign-posted for any speed limit.

The jury was instructed that the driver need not sound a horn unless it reasonably appears necessary, that if the sound of a horn could not have been heard above the noise of the train, then the failure to sound it was not a proximate cause of the accident.

The court gave but one instruction on the subject of workmen in the street and that is the one complained of in appellant's brief at page 27 under the heading "C". Noth-

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[4]There was no proof of such and the giving of these instructions constituted error (*Perry v. Piombo* (1946) 73 Cal. App. 2d 569, 166 P. 2d 888).

ing was said about the greater care imposed upon the driver by reason of this fact, if found to exist.

The jury was further told that an award of damage, if any, should not be influenced by charity or sympathy, and "Nor can you make a finding against the defendants, based upon mere guess, speculation, or conjecture" (380).[5]

The court told the jury that it was their duty first to ascertain whether or not there was any liability upon a defendant, or either of them, it admonished the jury not to consider the question of damages "*for any purpose*" until they had "*first decided whether or not any defendant is liable*" (381). This admonition was repeated and the court said "the jury is admonished to first consider and decide the question of liability" (381).[6]

The jury was charged "If you make an award in favor of the plaintiff" "they [the damages] must not in any event exceed what is reasonable," nor should they "constitute either a gift or windfall to the plaintiff, or punishment or penalty to the defendants" (385).

The jury was told that if a verdict were returned in favor of the plaintiff "then in making the amount of recovery, you must bear in mind that a defendant is just as much entitled to your consideration as is the plaintiff,"

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[5]In *Midland Valley R. Co. v. Bradley* (10 Cir. 1930) 37 F. 2d 666, it was held that where there was positive circumstantial evidence to support a finding for plaintiff such an instruction was properly refused.

[6]This was improper interference with the deliberations of the jury in performing their function; additionally so, because the injuries in themselves, the nature of the injuries inflicted, tended to establish negligence of defendant's driver.

Ryan v. Burrow (Mo. 1930) 33 S.W. 2d 928, 930;
Sebrell v. Los Angeles Ry. Corporation (1948) 31 Cal. 2d 813, 192 P. 2d 898.

that "The defendant is entitled to protection at your hands against any unjust or unreasonable demand" (385).

The jury was told that the plaintiff could not recover on his full earnings, but only upon the net amount thereof after deduction from income tax.[7]

After subjecting the court to a bombardment of more than one hundred requested instructions, in the hope, we think, that somewhere, somehow the court might fall into error, and even though the court in self-defense and to avoid even the slightest color for a claim of error, gave defendant's requested instructions, the defendant pretends that the case was not fairly tried as to it.

In *Taha v. Finegold* (1947) 81 Cal. App. 2d 536, 184 P. 2d 533, the jury returned a verdict in favor of the defendant. The court, reviewing the instructions as a whole, and we think in a situation strikingly similar to that presented here, called attention to the number of instructions requested by the defendants and the number of such given by the court. It commented on their character and the failule to give corresponding instructions on behalf of the plaintiff. It said (p. 536):

> "An examination of all the instructions given shows a serious situation, and justifies the objections of

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[7]In *Stokes v. United States* (2 Cir. 1944) 144 F. 2d 82, 87, refusal to make a deduction for income taxes in the estimate of the expected earnings was held proper.

In *Chicago & N.W. Ry. Co. v. Curl* (8 Cir. 1949) 178 F. 2d 497, it was held proper to refuse to receive defendant's offer of proof of plaintiff's net earnings after deductions (citing the *Stokes* case, supra; *Cole v. Chicago, St. P. M. & O. Ry. Co.* (Minn. 1945) 59 F. Supp. 443, 445; *Majestic v. Louisville & N.R. Co.* (6 Cir. 1945) 147 F. 2d 621, 626-627).

The rule is likewise stated in the annotation on the subject in 9 A.L.R. 2d 320.

> plaintiff. * * * The whole result was an unnecessary and obvious emphasis upon the duties of the pedestrian and an extremely light stress on the duties of the truck driver."

It said (p. 537):

> "* * * a reading of the instructions as a whole gives the definite feeling that the court, either intentionally or unintentionally, was telling the jury that as the plaintiff admittedly looked only once, the verdict should be for the defendants."

It concluded (p. 538), "Plaintiff was thereby deprived of a fair trial," and reversed the judgment.

In *Southern Pac. Co. v. Guthrie* (9 Cir. 1949) 180 F. 2d 295, this court reviews the refusal of United States District Judge Louis E. Goodman to give defendant's requested instructions, many of them duplicates of those the court did give here. It held that their refusal was not error, and said (pp. 301-302):

> "While some of these requested instructions might properly have been added to the charge, yet we find no prejudicial error in their omission. Others were properly refused for other reasons. Some were peremptory, and therefore, for reasons we have previously stated in commenting upon proof of negligence, they were properly rejected."

III. CONCLUSION.

We think it clearly appears that the issues of negligence and contributory negligence were issues of fact for the jury's determination.

We think the case was tried and submitted under rulings and instructions much more favorable to the defendant than the law prescribes.

We suggest that this appeal is groundless and that this court should invoke the provisions of Rule 26(2) of the rules of this court.

It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
June 2, 1950.

HERBERT O. HEPPERLE,
Attorney for Appellee.

No. 12,482

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC PORTLAND CEMENT COMPANY
(a corporation),
Appellant,

vs.

WILLIAM A. BELLAMY,
Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellee in his brief has made the claim that our brief is "false and misleading" (Appellee's Brief, p. 2), and has wound up by suggesting that appellant merits the rigors of Rule 26(2).

Although we compliment appellee's zeal, we suggest that his claims deserve close scrutiny, and turn now to discuss, *seriatim,* certain assertions made by him.

A. THERE WAS NO EVIDENCE THAT APPELLEE'S DUTIES REQUIRED HIM TO TAKE A POSITION IN THE HIGHWAY.

It is claimed by appellee (Brief p. 5) that he "was *required* to drop off the moving cut of cars and take a position upon the highway."

As we understand the testimony, appellee dropped off the train for the purpose of receiving signals from the crew at the east of the movement and passing them to the engineer (Tr. 52, 53, 124, 258-9). He also, apparently, was to act as the eyes of the engineer respecting conditions at the west end of the movement (Tr. 238-9).

We do not see how it can be claimed that this activity *"required"* him to take a position in a heavily travelled highway (much less to run into the highway). Lechner, the conductor, had taken position on the south side of the road, and was performing the function of passing signals (T. 182-183). The fact is, as obviously appears from the physical evidence (Plaintiff's Exhibit No. 6), that appellee could have very readily discharged his duties by taking a safe position on the south side of the highway where Lechner was at the time of the accident.

We still fail to find any place in the testimony which suggests that appellee was *required* to be in the highway.

This is of particular significance when it is borne in mind that the "workmen in the street cases" involve situations where the task of the injured party actually *required* him to be in the street: a person digging a

hole in the middle of a highway cannot dig it unless he is in the middle of the highway; in the instant case, it is undisputed that the area immediately to the south of the highway was clear and available to appellee had he chosen to use it. In this connection, it is clear (we submit) that appellee had only to glance in either direction on the highway and then to walk across the highway and take a position of safety on the south side of the highway.

To summarize, we submit that appellee's claim that his duties "required" him to be in the heavily travelled highway was wholly unsupported by the evidence.

It is true, of course, that the engineer, Edwards, testified that he considered appellee's position a "proper" one (Tr. 205). Edwards' testimony that appellee's position was "proper" is, however, not evidence that it was *necessary*. Indeed, in this respect, Edwards testified that it was matter of choice with appellee (T. 209-211).

On the question of whether appellee's action in taking position in the highway was in accordance with "custom and practice", Lechner, the conductor, testified (T. 258-259) in the affirmative; he qualified his testimony, however, by saying that such custom and practice would involve *looking* before dashing into the highway (T. 260).

It is hardly necessary to point out (i) that custom and practice will not excuse negligence and (ii) that custom and practice does not establish that appellee's duties *required* him to be in the highway.

B. THERE WAS NO EVIDENCE THAT APPELLANT'S DRIVER WAS MORE THAN 1000 FEET FROM APPELLEE WHEN HE "ROUNDED THE CURVE" AND THAT THE DRIVER HAD APPELLEE IN HIS "UNOBSTRUCTED VIEW" FOR A DISTANCE OF 500 FEET.

It is argued by appellee (Brief, p. 7) that the physical facts which the jury was entitled to consider showed that appellant's driver was more than 1000 feet from plaintiff when he rounded the curve, and that (Appellee's Brief, p. 9) appellant's driver had appellee in view for a distance of 500 feet before the impact.

The evidence offered by the plaintiff (Plaintiff's Exhibit No. 6), as well as the two photographs printed between pages 2 and 3 of appellee's brief, demonstrate that the accident occurred at the apex of a curve where vision up and down the highway was restricted.

Furthermore, even if the evidence might lend itself to the construction originated by appellee, it is obvious, we submit, that appellee, under his construction of the facts, would be hoisted by his own petard: if appellant's driver could have seen appellee 500 feet, it is equally clear that appellee, by the slightest exercise of care, could have seen appellant's driver and vehicle at a like distance, and that had he so much as glanced in the direction from which traffic could be expected, the accident would not have happened.

C. THERE IS NO EVIDENCE THAT APPELLANT'S DRIVER STRUCK APPELLEE WITH THE FRONT END OF THE TRUCK BODY.

Edwards, called as a witness by appellee, testified that "the rear end, the rear fender, caught Mr. Bellamy in the back" (T. 175).

Appellee in his brief argues that there is evidence from which the jury could have found that appellee was struck by the *front* of appellant's vehicle (Appellee's Brief, pp. 14-15).

Appellee points out that appellant's driver told the witness Lechner that "First I know the man was right in front of me, and I tried to miss him, but I guess I didn't" (Brief, p. 12). Appellee also argues (Brief, p. 14) that the injuries sustained "in themselves show that plaintiff was struck with terrific force and that he was struck not as claimed by defendant's driver Carlson by the rear fender, but by the front end of the truck body".

We submit that neither of the portions of evidence relied upon by appellee afford the slightest support for appellee's claim that he was struck by the front of appellant's vehicle, particularly in view of the uncontradicted and unqualified testimony of appellee's witness Edwards that appellee was struck by the right rear fender of appellant's vehicle.

Carlson, appellant's driver, testified that he saw appellee hanging on the box car. As stated in appellee's brief (p. 10), "Carlson actually saw plaintiff hanging on the box car as he drove around the curve". It is obvious that at the time in question appellee was

"in front of" appellant's driver. That is all that can be claimed with respect to the statement made by appellant's driver to the witness Lechner.

We can hardly take seriously appellee's unqualified assertion that the nature of his injuries shows that he was struck by the front of appellant's vehicle rather than by the right rear fender.

With respect to this claim of appellee, we quote as follows from 7 Cyc. of Fed. Proc., p. 578, sec. 3349:

> "Evidence which does no more than open the door to *speculation* is not sufficiently substantial to support a verdict. If the probative force of the evidence in favor of a party having the burden of proof does not go beyond creating a mere suspicion, a verdict should be directed against him. Neither will his unreasonable or improbable testimony be sufficient to take the case to the jury."

D. THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUSTAIN APPELLEE'S CLAIM THAT HE WALKED INTO THE HIGHWAY; ON THE CONTRARY, HIS OWN TESTIMONY ESTABLISHES CONCLUSIVELY THAT HE RAN FROM A PLACE OF SAFETY OUT INTO THE STREAM OF TRAFFIC.

We set out in our opening brief (pp. 14-15) appellee's account of his movements from the moment he left the train until the moment of impact.

Appellee claims (Brief, pp. 15-16) that he *walked* into the street.

It is very clear from a reading of appellee's testimony that he *ran* into the street.

This testimony did not express a mere opinion or estimate, but was an unqualified sworn statement of appellee as to his activities at the time of the accident. As stated in an annotation in 169 A.L.R. 798 at 800:

> "If a party testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, his adversary is entitled to hold him to it as an informal judicial admission."

Appellee seeks to escape the binding effect of his own account of the manner in which the accident happened by invoking (Appellee's Brief, p. 2, footnote 3) certain California cases which held that under the facts of the case the jury was entitled to accept a version more favorable than the testimony of the injured party would suggest.

An analysis of these cases demonstrates, however, that the general rule stated in the annotation just referred to obtains in California. Thus, in *Gibson v. County of Mendocino* (1940) 16 Cal. 2d 80, the party whose negligence had injured the plaintiff claimed that she was bound by her own testimony; the court pointed out (p. 87) that the witness "was not making an admission or testifying to a fact peculiarly within her own knowledge * * * she, therefore, was not conclusively bound by her own testimony".

We submit that the language used by the court shows that where the witness *is* "testifying to a fact

peculiarly within" the knowledge of the witness, the party-witness is bound by his own testimony, in accordance with the general rule above referred to.

Accordingly, when appellee testified that he ran into the highway, he adopted a version of the facts from which he may not now depart.

E. THE "WORKMEN IN THE STREET" CASES RELIED UPON BY APPELLEE INVOLVE SITUATIONS WHERE WORK WAS ACTUALLY BEING DONE IN THE STREET AND AFFORD NO ANALOGY TO A SITUATION WHERE (AS HERE) THE "WORK" COULD HAVE BEEN DONE AS READILY, AND IN SAFETY, AT A POSITION OTHER THAN IN THE HIGHWAY.

We have already shown (point A, supra) that appellee was not *required* by his duties to work in the highway, much less to run out into the highway.

In the cases invoked by appellee (Appellee's Brief, pp. 22-30), it will be noted that the workmen involved were engaged in performing some duty which, in the nature of things, could be performed *only* on the highway.

They are not authority for the proposition that a workman who can as readily perform his duties in a place of safety—the clear area on the south shoulder of the highway—is entitled to special consideration when of his own free will he chooses a perilous place to work.

F. THERE IS NO SUPPORT IN THE AUTHORITIES FOR APPELLEE'S CLAIM THAT APPELLANT'S DRIVER WAS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Appellee makes the bald assertion (Brief, p. 30) that the evidence "conclusively establishes negligence as a matter of law", and cites four cases (Brief, pp. 21-35) which he claims support that contention.

In the first three of these cases—*Quinn v. Rosenfeld* (1940) 15 Cal. 2d 486, 102 P. 2d 317; *Fuentes v. Ling* (1942) 21 Cal. 2d 59, 130 P. 2d 121, and *Jacoby v. Johnson* (1948) 84 Cal. App. 2d 271, 190 P. 2d 243—the question of negligence was held to be one of fact and not of law. In the fourth case—*Huetter v. Andrews* (1949) 91 Cal. App. 2d 142, 204 P. 2d 655—the injured party observed the defendant's car when it was 850 feet away; in the instant case, appellee did not even look for approaching vehicles; in the cited case, the defendant, although he looked straight ahead the entire time, did not see the adverse vehicle until it was too late for him to avoid it; in the instant case, as we pointed out in our opening brief (p. 18), appellant's driver observed appellee at a place of safety and caught a glimpse of him as he jumped off the car (Tr., pp. 328-329). There is nothing anywhere in the evidence contrary to appellee's testimony on this point, and no reasonable basis upon which it could be rejected.

It follows that the cases cited by appellee wholly fail to support his claim that appellant's driver was guilty of negligence as a matter of law.

G. THE AUTHORITIES RELIED UPON BY APPELLEE DO NOT ALTER THE RULE THAT A PEDESTRIAN WHO CROSSES A WELL-LIGHTED THOROUGHFARE OTHER THAN ON A CROSSWALK, IN A DIAGONAL LINE AND WITH HIS BACK PARTLY TURNED TO APPROACHING TRAFFIC AND IS STRUCK BY A CAR APPROACHING FROM THE QUARTER FROM WHICH TRAFFIC WAS TO BE EXPECTED IS GUILTY OF NEGLIGENCE AS A MATTER OF LAW.

Attempting to reply to our argument (Appellant's Opening Brief, pp. 21-27, appellee, in his brief (pp. 35-42) asserts that *Mundy v. Marshall* (1937) 8 Cal. 2d 294, involved a pedestrian who was drunk. The opinion does not so state, but that is, of course, beside the point because the rights of drunk persons are at least no greater than the rights of sober persons. The fact is that all persons who enter a highway "in a diagonal line" with their "back partly turned to approaching traffic" and are "struck by a car approaching from the quarter from which traffic was to be expected" are guilty of negligence as a matter of law under the rule of *Mundy v. Marshall.*

Appellee apparently adopts the view that *Mundy v. Marshall* has been overruled by *Salomon v. Meyer* (1934) 1 Cal. 2d 11, which, of course, was decided three years before *Mundy v. Mundy* and, therefore, cannot be said to overrule it.

Appellee also relies upon *Fuentes v. Ling* (1942) 21 Cal. 2d 59. Appellee does not state all the facts of the case, but it is interesting to note that the pedestrian observed the vehicle which struck him when the vehicle was 200 feet away "with nothing to obstruct his view". The court held that under the circumstances the injured person was not guilty of contrib-

utory negligence as a matter of law. There was no evidence anywhere in the record that appellee observed appellant's vehicle at any time before the impact.

H. HAVING PREVAILED IN THE COURT BELOW, APPELLEE IS IN NO POSITION TO COMPLAIN OF INSTRUCTIONS GIVEN BY THE TRIAL COURT.

In his final point, appellee spends considerable time (Brief, pp. 53-61) complaining of instructions given by the trial court.

It is unnecessary to point out that, having prevailed, appellee is in no position to complain of these instructions. 5 Cor. Jur., p. 161, "Appeal and Error", sec. 1498.

Dated, San Francisco, California,
June 16, 1950.

Respectfully submitted,
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